UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SAC AND FOX NATION OF MISSOURI; IOWA TRIBE OF KANSAS AND NEBRASKA; THE KICKAPOO TRIBE OF INDIANS, of the Kickapoo Reservation in Kansas,

Plaintiffs - Appellees,

v. No. 99-3019

KARLA PIERCE, Secretary Kansas Department of Revenue,

Defendant - Appellant.

ORDER

Filed July 14, 2000

Before **BALDOCK, BRORBY,** and **LUCERO,** Circuit Judges.

Appellees' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

SAC AND FOX NATION OF MISSOURI; Iowa Tribe of Kansas and Nebraska; The Kickapoo Tribe of Indians, of the Kickapoo Reservation in Kansas, Plaintiffs-Appellees,

v.

KARLA PIERCE, Secretary, Kansas Department of Revenue, Defendant-Appellant.

No. 99-3019.

May 30, 2000.

Before BALDOCK, BRORBY, and LUCERO, Circuit Judges.

BALDOCK, Circuit Judge.

The State of Kansas imposes a tax, subject to enumerated exceptions, on the distribution of motor fuel to retailers within the State. Kan. Stat. Ann. § 79-3408(a) (1999 Supp.). The distributor, rather than the retailer, is responsible for remitting the tax. *Id.* § 79-3408(c). When the Kansas Department of Revenue announced its intention to begin collecting tax on motor fuel distributions to retail gasoline stations on Indian lands within the State, three federally-recognized Indian Tribes, the Sac and Fox Nation of Missouri; the Iowa Tribe of Kansas and Nebraska; and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas (the Tribes), filed suit in federal district court to enjoin the State from collecting its tax on fuel distributed to the Tribes' retail stations. The principal

issue before us is whether the State of Kansas may impose its motor fuel tax as currently designed on fuel distributed to these retail stations on Indian lands within the State.

I.

The facts underlying this case are not in dispute. The Tribes are the beneficial owners of trust lands within the State of Kansas. The United States holds legal title to the lands in trust for the benefit of the Tribes. Each of the Tribes own and operate retail gasoline stations on these lands. The stations are located along or near Kansas state highways. Prior to May 1995, the Kansas Department of Revenue took the position that the motor fuel tax law as written did not permit the State to tax motor fuel distributed on Indian lands. After the Kansas legislature amended the Kansas Motor Fuel Tax Act in 1995, *see* Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997), however, the department reversed its position and this litigation ensued.

In their complaint, the Tribes sought declaratory and injunctive relief against the State based upon both federal and state law. The Tribes invoked the district court's jurisdiction under U.S. Const. art. I, § 8, cl. 3 and 28 U.S.C. §§ 1331, 1362, 1367. The Tribes claimed that (1) federal law pre-empted the motor fuel tax law as applied to the Tribes, (2) the motor fuel tax law as properly construed did not apply to fuel distributed to the Tribes, and (3) imposing the motor fuel tax on the Tribes would irreparably harm their economic viability.

The district court issued both a temporary restraining order, *Sac and Fox Nation v. LaFaver*, 905 F.Supp. 904 (D.Kan.1995), and a preliminary injunction, *Sac and Fox Nation v. LaFaver*, 946 F.Supp. 884 (D.Kan.1996), against the State. The district court next denied both the State's motion to dismiss the Tribes' complaint based on sovereign immunity, *Sac and Fox Nation v. Lafaver*, 979 F.Supp. 1350 (D.Kan.1997), and its motion to reconsider, *Sac and Fox Nation v. LaFaver*, 993 F.Supp. 1374 (D.Kan.1998). On

cross motions for summary judgment, the court entered judgment for the Tribes and permanently enjoined the State from enforcing its motor fuel tax law against the Tribes. *Sac and Fox Nation v. Lafaver*, 31 F.Supp.2d 1298 (D.Kan.1998).

Addressing a myriad of legal issues, the district court first held the Tribes had standing to pursue their claims against the State. *Id.* at 1302. Turning to the merits, the court held that (1) tax compacts between the Tribes and State did not prohibit the State from imposing its fuel tax on fuel distributed to the Tribes, *id.* at 1302-03, (2) the fuel tax exemption for fuel sold or delivered to the United States and its agencies, Kan. Stat. Ann. § 79-3408(d)(2) (1999 Supp.), did not encompass the Tribes, *Sac and Fox Nation*, 31 F.Supp.2d at 1303-04,[1] but (3) the fuel tax exemption for fuel exported from the State to territories outside the State did encompass Indian lands:

> The statute [Kan. Stat. Ann. § 79-3408(d)(1) (1999 Supp.] exempts any fuel transactions where the fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas legislature was to exempt any transaction where the fuel was to be sold outside the boundaries of the State of Kansas. As the Act for Admission of Kansas into the Union [Ch. XX, § 1, 12 Stat. 126 (1861)] . . . clearly exclude[s] the Indian reservations from the boundaries of the State of Kansas, it is only reasonable that § 79-3408(d)(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations.

Sac and Fox Nation, 31 F.Supp.2d at 1304.

---

[1] On appeal, the Tribes do not challenge the district court's conclusions that (1) their tax compacts with the State of Kansas have expired and are no longer of any legal force, and (2) the fuel tax exemption for fuel sold or delivered to the United States and its agencies does not encompass Indian tribes.

As an alternative basis for issuing a permanent injunction against the State, the court relied on *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), to hold that although the legal incidence of the fuel tax fell on the distributors rather than the Tribes, the balance of tribal and state interests weighed in favor of the Tribes, thus requiring the court to invalidate the tax as applied to the Tribes. *Sac and Fox Nation*, 31 F.Supp.2d at 1304-08. The district court subsequently denied the State's motion to alter the judgment, *Sac and Fox Nation v. Pierce*, 45 F.Supp.2d 859 (D.Kan.1999), and the State appealed. Our jurisdiction arises under 28 U.S.C. § 1291. We address each of the State's several challenges to the district court's judgment in turn. We reverse the judgment of the district court and remand for further proceedings.

II.

As a preliminary matter, we address the district court's power to adjudicate this case on the merits. The State contends the district court had no jurisdiction over this controversy because (1) the doctrine of sovereign immunity bars the Tribes' suit, and (2) the Tribes' have no standing to maintain their suit. The district court's determination of subject matter jurisdiction is a question of law which we review de novo. *Rosette Inc. v. United States*, 141 F.3d 1394, 1395 (10th Cir.1998). Applying this standard, we reject the State's jurisdictional contentions, and conclude the district court properly exercised jurisdiction over this cause.

A.

In the district court, the Tribes alleged jurisdiction under U.S. Const. art. I, § 8, cl. 3 and 28 U.S.C. § 1362, as well as under the general federal question and supplemental jurisdiction statutes, 28 U.S.C. §§ 1331, 1367. The Tribes rely on Article I's Indian Commerce Clause which gives Congress the power "[t]o regulate Commerce . . . with the Indian

Tribes." Meanwhile, § 1362 is a specific grant of jurisdiction to the district court in matters involving Indian tribes: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, law, or treaties of the United States." The State asserts that neither of these provisions is sufficient to overcome the State's sovereign immunity under the Eleventh Amendment, U.S. Const. amend. XI.

The Eleventh Amendment, as construed by the Supreme Court, generally proscribes federal jurisdiction over suits against nonconsenting states unless Congress has abrogated the states' sovereign immunity in a clear and unequivocal manner pursuant to a valid exercise of its power. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54-55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding that Congress lacks power under Article I to abrogate a state's sovereign immunity from suits brought by private parties.). In *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991), the Supreme Court rejected the notion that the Eleventh Amendment "only restricts suits by *individuals* against sovereigns, not by *sovereigns* against sovereigns." *Id.* at 780, 111 S.Ct. 2578 (emphasis in original). The Court likewise rejected the notion that the states waived their immunity against Indian tribes when they adopted the Constitution: "We have hitherto found a surrender of immunity against particular litigants [inherent in the constitutional compact] in only two contexts: suits by sister States and suits by the United States." *Id.* at 781-82, 111 S.Ct. 2578 (internal citation omitted). Accordingly, the Court held that the Eleventh Amendment barred an Indian tribe's suit under a state revenue sharing plan against an Alaskan state official, despite the tribe's sovereign status. In so holding, the Court also rejected the notion that 28 U.S.C. § 1362 operated as a general waiver of a state's sovereign immunity. Paramount to our analysis, however, was the Court's

recognition that in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), a case involving an Indian tribe's access to federal court "for the purpose of obtaining injunctive relief from state taxation," the Court had reached a different conclusion. *Blatchford*, 501 U.S. at 784, 111 S.Ct. 2578.

In *Moe*, the Court upheld an Indian tribe's right to seek injunctive relief from state taxation in federal court. *Moe* involved, among other things, an attack on Montana's cigarette sales tax as applied to cigarette sales to both Indians and non-Indians on Indian lands. Before reaching the merits, the Court addressed the district court's jurisdiction to entertain the tribe's suit against a Montana sheriff responsible for enforcing the tax. *Moe*, 425 U.S. at 470-475, 96 S.Ct. 1634. The Court held that § 1362 proscribed application of the Tax Injunction Act, 28 U.S.C. § 1341, to the tribe's suit.[2] The Court first noted that § 1341 did not apply to suits "brought by the United States 'to protect itself and its instrumentalities from unconstitutional state exactions.' " *Moe*, 425 U.S. at 470, 96 S.Ct. 1634 (quoting *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 17 L.Ed.2d 414 (1966)). From this principle, the Court reasoned:

> Looking to the legislative history of § 1362 . . . we find an indication of congressional purpose to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought. Section 1362 is characterized by the reporting House Judicial Committee as providing "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf

---

[2] The Tax Injunction Act provides that federal "district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state." 28 U.S.C. § 1341.

> by the Government or by their own attorneys." [H.R.Rep. No.2040, 89th Cong., 2d Sess., 2-3 (1966), U.S. Code Cong. & Admin. News at 3145, 3146-47]. While this is hardly an unequivocal statement of intent to allow such litigation to proceed irrespective of other explicit jurisdictional limitations, such as § 1341, it would appear that Congress contemplated that a tribe's access to federal court to litigate a matter arising "under the Constitution, laws, or treaties" would be at least in some respects as broad as that of the United States suing as the tribe's trustee.

Id. at 472-73, 96 S.Ct. 1634. *See also United States v. Rickert*, 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532 (1903) (upholding Government's right to seek injunctive relief against county taxation directed at improvements on and tools used to cultivate Sioux Indian lands).

In *Moe*, the Court concluded that because § 1341 would not bar the United States from seeking to enjoin enforcement of the state tax law on the tribe's behalf, the tribe itself could maintain its suit against the state. *Moe*, 425 U.S. at 474-75, 96 S.Ct. 1634. The Court emphasized that its decision " 'rested upon a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection.' " *Moe*, 425 U.S. at 473, 96 S.Ct. 1634 (quoting *Heckman v. United States*, 224 U.S. 413, 441, 32 S.Ct. 424, 56 L.Ed. 820 (1912)).

Moe leads us to conclude that we have jurisdiction under 28 U.S.C. § 1362 to reach the merits of this case. Surely if an Indian tribe may maintain suit on its own behalf in federal court to enjoin collection of a state's cigarette sales tax, it may maintain a similar suit on its own behalf to enjoin collection of a state's motor fuel distribution tax. Neither the Tax Injunction Act nor the Eleventh Amendment bars the Tribes' suit in this

case. Undoubtedly after *Seminole Tribe*, the Eleventh Amendment generally bars an Indian tribe's suit in federal court against a state where the tribe's claim rests solely on Article I's Indian Commerce Clause. As the Supreme Court stated in both *Blatchford* and *Moe*, however, an Indian tribe's suit for injunctive relief against state taxation occurring on trust lands is another matter. *Blatchford* expressly recognized what *Moe* necessarily inferred from § 1362. *Blatchford* explained that in *Moe*, the Court found in § 1362-

> an implication that a tribe's access to federal court to litigate federal-question cases would be *at least in some respects* as broad as that of the United States suing as the tribe's trustee. The "respect" at issue in *Moe* was access to federal court for the purpose of obtaining injunctive relief from state taxation.

Blatchford, 501 U.S. at 784, 111 S.Ct. 2578 (emphasis in original) (internal citations, quotations, and brackets omitted). Accordingly, we conclude that the Eleventh Amendment does not bar the Tribes' suit against the State to enjoin enforcement of the Kansas motor fuel tax law.[3]

---

[3] The district court relied on the legal fiction established in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), to overcome the State's claim of sovereign immunity. *Sac and Fox Nation*, 979 F.Supp. at 1352-54. Under the *Ex Parte Young* legal fiction, when an official of a state agency is sued in her official capacity for prospective equitable relief, she is generally not regarded as "the state" for purposes of the Eleventh Amendment, and the case may proceed in federal court. *See ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1188 (10th Cir.1998). Because we conclude that we have jurisdiction to reach the merits of this case under 28 U.S.C. § 1362, we decline to address the question of *Ex Parte Young's* application to matters of state taxation affecting Indian tribes.

B.

We next turn to the question of the Tribes' standing to maintain their suit against the State. The State argues that because the district court determined the legal incidence of the motor fuel tax fell on the distributors rather than on the tribal retailers, *Sac and Fox Nation*, 31 F.Supp.2d at 1304-07, the Tribes lack standing to challenge the motor fuel tax. According to the State, the law does not confer standing upon the Tribes merely because they either must absorb the overhead cost of the fuel distributed to them or pass the cost along to their consumers.

The standing inquiry requires us to consider "both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). The constitutional standing question is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Id.* at 498-99, 95 S.Ct. 2197 (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). The Supreme Court has identified three constitutional standing requirements. A plaintiff must allege (1) a concrete and particularized actual or imminent injury, (2) which is fairly traceable to defendant's conduct, and (3) which a favorable court decision will redress. *Northeastern Fla. Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 508 U.S. 656, 663-64, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993).

Additionally, the Supreme Court has identified three prudential standing principles. First, a plaintiff generally must assert its own rights, rather than those belonging to third parties. *Warth*, 422 U.S. at 499, 95 S.Ct. 2197. Second, "a generalized grievance" shared by a large class of citizens normally does not warrant a federal court's exercise of

jurisdiction. *Id.*[4] Third, the interests which a plaintiff seeks to protect must "arguably [be] within the zone of interests to be protected by the statute or constitutional guarantee." *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

We have little difficulty concluding that the Tribes in this case have constitutional standing to maintain their suit against the State. First, the Tribes have alleged particularized imminent economic injury if the State imposes its motor fuel tax on fuel distributed to the Tribes' retail stations. The Tribes' uncontroverted affidavits, albeit conclusory, support their allegations of injury. *See Warth*, 422 U.S. at 501, 95 S.Ct. 2197 (plaintiff may submit affidavits to particularize allegations of fact in support of its standing). Second, the Tribes' alleged injury is directly traceable to the State's desire to tax these distributions. Finally, a decision in favor of the Tribes enjoining the State from enforcing the motor fuel tax against their distributors would likely redress the Tribes' alleged injury since most assuredly the distributors responsible for remitting the tax pass the cost of the tax along to the Tribes. *See* Kan. Stat. Ann. § 79-3409 (1999 Supp.) (expressly permitting the distributor to include the cost of the motor fuel tax in its selling price).

We likewise conclude that prudential standing principles do not bar our exercise of jurisdiction in this case. Certainly the Tribes assert their own rights under both federal and state law to be free from the cost of the motor fuel tax, though any decision in their favor undoubtedly will benefit their distributors and consumers as well. Thus, we do not agree with the

---

[4] In *Warth*, 422 U.S. at 499, 95 S.Ct. 2197, the Supreme Court indicated that the standing principle against generalized grievances of citizen groups, which implicitly includes taxpayer groups, was prudential rather than constitutional. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-62, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), however, the Court treated the bar on such lawsuits as constitutional.

State's argument that because the district court determined the legal incidence of the motor fuel tax falls upon the distributors rather than the retailers, *see id. § 79-3408*(c) (expressly stating that the incidence of the motor fuel tax is on the distributor), the Tribes' claims amount to little more than a "generalized grievance" shared by all retailers to whom the distributors pass the cost of the tax.

In resolving challenges to state taxation affecting tribal businesses on Indian lands, the Supreme Court has addressed the legal incidence of a tax as a question intertwined with the merits of the case. *E.g., California State Bd. of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 10-12, 106 S.Ct. 289, 88 L.Ed.2d 9 (1985) (per curiam) (holding that because the legal incidence of the state's cigarette sales tax fell on non-Indian consumers, the state could require the tribe to collect the tax on the state's behalf); *Moe*, 425 U.S. at 481-83, 96 S.Ct. 1634 (same). In *Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214, the Court recognized that where the legal incidence of a tax falls on non-Indians, the tribe may still be entitled to injunctive relief if federal law preempts state law or the balance of federal, state, and tribal interests favors the tribe. *Chickasaw Nation*'s balancing requirement implicitly embraces our conclusion that regardless of where the legal incidence of the motor fuel tax falls, the Tribes at the very least have a particularized claim of injury, rather than a "generalized grievance," with respect to the tax sufficient to confer standing upon them. *See Moe*, 425 U.S. at 468 n. 7, 96 S.Ct. 1634.

Finally, the alleged economic interests of the Tribes in this case are arguably within the zone of interests which federal law seeks to protect. Consistent with the long standing recognition of Indian tribes as "domestic dependent nations," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L.Ed. 25 (1831), the federal government has sought to protect tribal self-government from state interference, including state taxation. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164,

170-71, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). *See also* 25 U.S.C. § 1322(b) (refusing to extend state's general civil jurisdiction over Indians to matters of taxation). The Supreme Court has repeatedly recognized the United States' interest in securing immunity to the Indians from state taxation which threatens Indian tribes' unique status. *Moe*, 425 U.S. at 473, 96 S.Ct. 1634. Absent congressional consent through statute or treaty, states have no power to directly tax tribal commerce on tribal lands. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).[5] *See also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-15 & n. 17, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987) (noting per se rule precluding state jurisdiction absent congressional consent over tribes and tribal members in the "special area of state taxation"). The Indian Commerce Clause gives Congress the power to regulate commerce with Indian tribes. *McClanahan*, 411 U.S. at 172 n. 7, 93 S.Ct. 1257. Surely the economic interests which the Tribes seek to protect by enjoining application of the State's motor fuel tax are "*arguably* within the zone of interests to be protected by th[at] . . . constitutional guarantee." *Camp*, 397 U.S. at 153, 90 S.Ct. 827 (emphasis added). Whether the Kansas motor

---

[5] In *Rice v. Rehner*, 463 U.S. 713, 713, 718-19, 103 S.Ct. 3291, 77 L.Ed.2d 961 (1983), the Court explained:

> Congressional authority and the semi-independent position of Indian tribes are two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. Although the right of tribal self-government is ultimately dependent on and subject to the broad power of Congress, we still employ the tradition of Indian sovereignty as a backdrop against which the applicable treaties and federal statutes must be read in our pre-emption analysis.

(internal quotations, citations, brackets and elipses omitted). Of course, in addition to treaties and statutes, stare decisis requires us to look to Supreme Court and Tenth Circuit decisions to define the limits of state jurisdiction in matters of taxation affecting Indian tribes.

fuel tax as applied interferes with that guarantee is a matter for legitimate judicial inquiry. To that question, we now turn.

III.

A.

At the outset, the State argues that Congress, through passage of the Hayden-Cartwright Act, 4 U.S.C. § 104, has consented to the state's taxing power in this instance. According to the State, § 104 cedes taxing jurisdiction to the states on motor fuel distributed on Indian lands. Section 104(a) provides in relevant part:

> All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State . . . within whose borders the reservation affected may be located.

Id. § 104(a). The State construes the phrase "located on United States military or other reservations" as including Indian lands. *See State v. Keeley*, 126 F.2d 863, 864-65 (8th Cir.1942) (discussing the history surrounding the enactment of § 104). We decline to address the State's § 104(a) argument, however, because the State did not properly present the question of § 104(a)'s applicability vis-a-vis the Kansas motor fuel tax to the district court, and thus the district court had no opportunity to consider or decide the question.

A federal appeals court generally will not consider an issue raised but not argued in the district court. *Rademacher v. Colorado Assoc. of Soil Conserv. Dist. Medical Benefit Plan*,

11 F.3d 1567, 1571 (10th Cir.1993). "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 121, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976). Where the question is one of law, we may relax the general rule if the proper resolution is beyond doubt or injustice might otherwise result. *Id. Accord Cavic v. Pioneer Astro Indus., Inc.*, 825 F.2d 1421, 1425 (10th Cir.1987). But we need not decide an issue otherwise waived simply because it may be "outcome determinative." *First Alabama Bank v. First State Ins. Co.*, 899 F.2d 1045, 1060 n. 8 (11th Cir.1990) (appeals court will decide waived issues "only in instances where strict application of the rule would result in patently unjust results").

In this case, the State raised the § 104(a) defense in its answer to the Tribes' complaint, both which were filed in 1995. Never again did the State raise the issue with the district court although it had ample opportunity to do so by way of both its motion to dismiss and its motion for summary judgment, as well as its subsequent motions to reconsider. *See Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 269 (7th Cir.1986) ("A contention included in an answer, but not pressed before the district court, may not be presented on appeal as ground for reversal.").[6] Suffice it to say that we are loath to resolve the § 104 issue for the first time on appeal. Neither the Supreme

---

[6] The State's sole reference to § 104 in the district court read as follows:

> *If* this court determines that the incidence of motor fuel tax under Kansas law is at the retail level and such incidence is determined by this court to fall on plaintiffs, the defendant affirmatively asserts that he is authorized by federal law, 4 U.S.C. § 104, to impose Kansas motor fuel tax on plaintiffs.

Aplt's App. at 97 (emphasis added). Presumably because the district court held the legal incidence of the motor fuel tax fell on the distributors rather than on the Tribes, the State felt no need to press its "conditional" § 104 defense.

Court nor any of the circuit courts of appeals, nor any court as far as we can discern, has addressed the difficult question of whether Congress intended 4 U.S.C. § 104(a) to encompass Indian lands. This being so, injustice would more likely result than not by us deciding the issue without the Tribes having an opportunity first to be heard on the merits in the district court. *See Singleton*, 428 U.S. at 121, 96 S.Ct. 2868.

B.

The district court relied on a combination of federal and state law to justify its issuance of a permanent injunction against the State. First, the court concluded that under the Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861), Indian lands were not within the boundaries of the State of Kansas. The Act, the court reasoned, "make[s] it very clear . . . that the Indian reservations are not to be considered part of the State of Kansas in any way." *Sac and Fox Nation*, 31 F.Supp.2d at 1304. The court then concluded that because Indian lands were not within the State, the distributors' motor fuel tax exemption for fuel exported from Kansas "to any other state or territory," Kan. Stat. Ann. § 79-3408(d)(1) (1999 Supp.), applied to fuel distributed on Indian lands. *Sac and Fox Nation*, 31 F.Supp.2d at 1304. Thus, the district court enjoined the State from taxing such distributions. We review the district court's construction of federal and state law de novo. *United States v. LaHue*, 170 F.3d 1026, 1028 (10th Cir.1999). Applying this standard, we believe the district court misconstrued the 1861 Act for Admission, and thus misapplied the statutory exemption to the Kansas motor fuel tax.

The 1861 Act for Admission of Kansas into the Union provides-

> [N]othing contained in the said constitution respecting the boundary of said State shall be construed . . . to include any territory which, *by treaty with such Indian tribe*, is not, without the consent of said tribe, to be included within the

> territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the State of Kansas.

12 Stat. 127 (emphasis added).[7] To our knowledge, the only federal decision construing the applicable provision of the 1861 Act is *United States v. Ward*, 28 F. Cas. 397 (C.C.D.Kan.1863) (No. 16,639). *Ward* involved the question of the United States' criminal jurisdiction over the murder trial of a non-Indian defendant whose victim was also non-Indian. The murder occurred on lands of the Kansas Tribe of Indians within the external boundaries of the State of Kansas. Holding the State of Kansas, not the United States, had jurisdiction over the matter, Supreme Court Justice Miller, riding circuit, reasoned that under the Act, all territory not previously exempted from the boundaries of the State of Kansas by treaty between the United States and an Indian tribe "was included within the state, within its jurisdiction and within its territory; and this irrevocably, unqualifiedly, and exclusively." *Id.* at 399.

We agree with Justice Miller's able construction of the 1861 Act for it is consistent with the Act's plain language. The Act for Admission excludes from the boundaries of the State of Kansas only those lands which Indian tribes reserved unto themselves "by treaty" with the United States. The Tribes fail to identify any language in any of the treaties provided us which we might construe as excluding their lands from the boundaries of the State. *See* Aplt's App. at 176-200. The Tribes argue, however, that the question is not whether the Indian lands at issue in this case are independent territories separate from the State for all purposes. Instead, they contend

---

[7] The Organic Act of 1854, Ch. LIX, § 19, 10 Stat. 284, which established the Territory of Kansas, contains nearly identical language. We need not consider in detail the Organic Act because our construction of the Act for Admission controls our construction of the Organic Act. *See United States v. Ward*, 28 F. Cas. 397, 398 (C.C.D.Kan.1863) (No. 16,639).

"[t]he question is whether Indian country is *excluded* from the legal territory of Kansas for purposes of motor fuel taxation." Aples' Br. at 26 (emphasis in original).

In a decision apparently overlooked by both the State and the Tribes, the Kansas Supreme Court resolved this very question in *Kaul v. State Dept. of Revenue*, 266 Kan. 464, 970 P.2d 60 (1998), *cert. denied*, — U.S. —, 120 S.Ct. 46, 145 L.Ed.2d 41 (1999). In *Kaul*, fuel retailers with businesses located on Indian lands claimed an exemption from the motor fuel tax under § 79-3408(d)(1), which provides: "No tax is hereby imposed upon or with respect to the . . . sale or delivery of motor-vehicle fuel . . . for export from the state of Kansas to any other state or territory. . . ." Kan. Stat. Ann. § 79-3408(d)(1) (1999 Supp.). The retailers made precisely the same argument as do the Tribes in this case. The Kansas Supreme Court rejected the argument, holding that "the exemption from taxation provided by K.S.A. § 79-3408(d)(1) did not apply to the retailers because Indian reservations within the boundaries of the State are not included as territories outside the boundaries of Kansas." *Kaul*, 970 P.2d at 66-67. Of course, absent some conflict with federal law or overriding federal interest, the Kansas Supreme Court's interpretation of § 79-3408(d)(1) is binding on us. *See Wainwright v. Goode*, 464 U.S. 78, 84, 104 S.Ct. 378, 78 L.Ed.2d 187 (1983). We conclude that neither the Act for Admission of Kansas into the Union, nor the statutory exemption contained in § 79-3408(d)(1), lends any support to the Tribes' challenge to the Kansas motor fuel tax law.

C.

As an alternative basis for issuing a permanent injunction against the State, the district court applied the balancing of interests test endorsed in *Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214: "[I]f the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors

the State, and federal law is not to the contrary, the State may impose its levy." Before balancing the parties' respective interest, however, the district court concluded that the legal incidence of the Kansas motor fuel tax fell on the distributors rather than on the Tribes. *Sac and Fox Nation*, 31 F.Supp.2d at 1304-07. As the district court recognized, if the legal incidence of the fuel tax falls on the Tribes for sales made on Indian lands, the fuel tax is unenforceable absent congressional consent:

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, "a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held a State is without power to tax reservation lands and reservation Indians."

Chickasaw Nation, 515 U.S. at 458, 115 S.Ct. 2214 (internal brackets and quotations omitted) (quoting *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992)). *See also Cabazon Band*, 480 U.S. at 215 n. 17, 107 S.Ct. 1083 (noting that where the legal incidence of a tax falls upon the tribe or its members, rebalancing the state and tribal interests in every case is unnecessary because "the federal tradition of Indian immunity from state taxation is very strong and the state interest in taxation is correspondingly weak"). Accord-ingly, we now turn to the question of who bears the motor fuel tax law's legal incidence.

1.

For our purposes, the question of where the legal incidence of the Kansas motor fuel tax rests is one of federal law. *See United States v. Mississippi Tax Comm'n*, 421 U.S. 599, 609 n. 7, 95 S.Ct. 1872, 44 L.Ed.2d 404 (1975); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121-122, 74 S.Ct. 403, 98

L.Ed. 546 (1954). Otherwise, "a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign." *Kern-Limerick*, 347 U.S. at 121, 74 S.Ct. 403. *But see Mescalero Apache Tribe v. O'Cheskey*, 625, F.2d 967, 968-69 (10th Cir.1980) (en banc) (citing *Kern-Limerick* for the proposition that in federal court, "[t]he holding of a state court as to the incidence of a [state] tax is *generally* determinative" of the issue) (emphasis added). Federal courts are duty bound to decide for themselves "facts and constructions" upon which federal issues turn. *Kern-Limerick*, 347 U.S. at 121, 74 S.Ct. 403. To determine whether the motor fuel tax transgresses federal law, we first "look through form and behind labels to [the] substance" of state law. *City of Detroit v. Murray Corp.*, 355 U.S. 489, 492, 78 S.Ct. 458, 2 L.Ed.2d 441 (1958). Mindful of how the tax operates under state law, we then apply federal standards to determine where the legal incidence of the tax rests. *See Kern-Limerick*, 347 U.S. at 121-22, 74 S.Ct. 403.

According to the Supreme Court, the legal incidence of a tax does not always fall upon the entity legally liable for payment of the tax. *Mississippi Tax Comm'n*, 421 U.S. at 607-10, 95 S.Ct. 1872. Rather, the legal incidence of a tax falls upon the entity or individual *necessarily* responsible for paying the tax under the taxing statutes. *Id.* In the absence of dispositive language indicating upon whom the legal incidence of a tax rests, "the question is one of 'fair interpretation of the taxing statute as written and applied.'" *Chickasaw Nation*, 515 U.S. at 461, 115 S.Ct. 2214 (quoting *Chemehuevi Tribe*, 474 U.S. at 11, 106 S.Ct. 289). Applying these principles, we agree with the district court that the legal incidence of the tax law as presently written falls on the fuel distributors rather than on the

Tribes.[8] *But see Kaul*, 970 P.2d at 67-69 (suggesting that the legal incidence of the Kansas motor fuel tax fell on the retailers where the distributors itemized the tax on retailers' bills as money due the State).

The Kansas Motor Fuel Tax Act provides that "[a] tax per gallon or fraction thereof, at a rate computed as prescribed . . . is hereby imposed on the use, sale or delivery of all motor vehicle fuels . . . which are used, sold or delivered in this state for any purpose whatsoever." Kan. Stat. Ann. § 79-3408(a) (1999 Supp.). Section 79-3408c appears to place a fuel tax upon both licensed distributors and retailers: "A tax is hereby imposed on the use, sale or delivery of all motor vehicle fuel . . . by any licensed distributor or licensed retailer. . . ." *Id. § 79-3408c*(a). Notably, however, subsection (c) of § 79-3408c excludes the Tribes from the retail tax: "The provisions of this section shall not apply to any licensed retailer who is native American whose licensed place of business or businesses are located on such retailer's reservation nor to any native American tribes having licensed places of business or businesses located on such tribe's reservation." *Id.* § 79-3408c(c). Perhaps most importantly, subsection 79-3408(b) provides that "the incidence of this [motor fuel] tax is imposed on the distributor of the first receipt of the motor fuel and such taxes shall be paid but once." *Id. § 79-*3408(b).

---

[8] The State makes no counterclaim against the Tribes for taxes past due under the Kansas Motor Fuel Tax Act, nor could it because the legal incidence, and thus liability for payment of the tax, falls on the distributors. Even if the legal incidence of the tax fell on the Tribes, no such action would lie because the doctrine of sovereign immunity bars the State from seeking recourse against the Tribes. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509-14, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) (absent clear waiver or congressional authorization, the sovereign immunity doctrine bars suits against Indian tribes). Accordingly, we express no opinion on the legal incidence of the fuel tax prior to the 1998 amendments to the Act. *See* Kan. Stat. Ann. §§ 79-3401 to 79-3464f (1997).

Despite their lack of legal liability for payment of the motor fuel tax, the Tribes argue the legal incidence of the tax falls upon them because the distributors simply pass on the cost of the tax to the Tribes in the wholesale price. To be sure, the motor fuel tax law presumes distributors will include the cost of the tax in their wholesale price to the Tribes. Section 79-3409 provides: "Every distributor paying such tax or being liable for the payment *shall be entitled* to charge and collect an amount, including the cost of doing business that could include such tax on motor vehicle-fuels . . . sold or delivered by such distributor, as a part of the selling price." *Id. § 79-3409* (emphasis added). But § 79-3409 also presumes that retailers will pass the cost of the tax along to their consumers: "When the price of motor vehicle fuels or special fuels . . . posted on a price sign does not include the state and federal tax which such retail dealer's distributor paid or for which the distributor was liable, the total of the taxes must be shown in numbers the same size as the price of the motor fuel." *Id.*

Significantly, the law's pass-through provision about which the Tribes complain is permissive rather than mandatory. *Compare Kern-Limerick*, 347 U.S. at 111, 74 S.Ct. 403 (holding unconstitutional, as applied to sales to the United States, a state sales tax statute which purported to tax the seller, but provided that the seller "shall collect the tax levied hereby from the purchaser"). Section 79-3409 does *not* require distributors to pass the cost of the motor fuel tax to retailers; it simply permits them to do so by stating the obvious. Even in the absence of § 79-3409, distributors could (and most assuredly would) pass along the cost of the fuel tax to retailers; but it is not necessary that they do so. As we said of an Oklahoma beer tax imposed on wholesalers who sold beer to tribal retailers on tribal lands:

> Even if it were true that the economic burden of the tax falls on the Tribe because the wholesalers simply incorporate the tax into the wholesale cost, this would not be determinative

> of the question of the legal incidence of the tax. Just as a nondiscriminatory tax imposed on a private entity that does business with the United States and that passes the cost of that tax on to the United States does not violate federal sovereign immunity, *so a nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity.*

Chickasaw Nation v. Oklahoma Tax Comm'n, 31 F.3d 964, 970 (10th Cir.1994) (emphasis added) (internal citations omitted), *aff'd in part, rev'd in part on other grounds*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

The Tribes ask us to substitute economic assumptions for the language of the Kansas statutes. But "[t]he question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." *Id.* at 972. "[F]ocus on a tax's legal incidence accommodates the reality that tax administration requires predictability." *Chickasaw Nation*, 515 U.S. at 459-60, 115 S.Ct. 2214. "[I]f a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence." *Id.* at 460, 115 S.Ct. 2214.

Certainly, if the fuel tax law required distributors to include the amount of the fuel tax in their wholesale price, we would be justified in concluding that the legal incidence of the tax falls upon the Tribes. *See Chickasaw Nation*, 31 F.3d at 971.[9] But

---

[9] In *Chickasaw Nation*, we held that the legal incidence of an Oklahoma motor fuel tax fell on the tribal retailers because the governing statutes indicated that the distributors remitted the fuel tax "on behalf of" licensed retailers. 31 F.3d at 971-72. The Supreme Court agreed with our construction of the Oklahoma statutes. *Chickasaw Nation*, 515 U.S. at 461-62, 115 S.Ct. 2214. Contrary to the Tribes' assertions, we cannot reasonably construe the Kansas statutes as requiring distributors to collect

the law does not require distributors to charge retailers the cost of the tax. Kansas law expressly states that the legal incidence of the motor fuel tax is upon the distributors and they are responsible for remitting the tax. *Kan. Stat. Ann.* § 79-3408(c) (1999 Supp.). *See Moe*, 425 U.S. at 482, 96 S.Ct. 1634. Moreover, the law expressly exempts the Tribes from the requirements of any retail fuel tax. *Id.* § 79-3408c(c). We conclude a fair reading of the motor fuel tax law supports the district court's determination that as applied in this case the legal incidence of the motor fuel tax falls upon the distributors.

2.

In the alternative, the Tribes argue that even if the legal incidence of Kansas' motor fuel tax falls upon the distributors, the Indian Trader Statutes, 25 U.S.C. §§ 261-264, constitute a comprehensive federal statutory scheme which preempts the State's fuel tax law. *See Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214 (if the legal incidence of a tax falls on non-Indians, a state may assess the tax if the balance of interests weighs in favor of the state "*and federal law is not to the contrary*") (emphasis added). Although the Tribes raised and argued the trader statutes' applicability in the district court, the court appears to have referred to the issue only cursorily. *Sac and Fox Nation*, 946 F.Supp. at 889 (order granting preliminary injunction). While the question of the trader statutes' applicability is not wholly separate from the balancing inquiry, *see Department of Taxation and Finance v. Milhelm Attea & Bros.*, 512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994), we address this issue before we proceed to our discussion of the balancing of interests.[10] We review federal

---

and remit the motor fuel tax "on behalf of" the tribal retailers.

[10] In *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, the Court explained:

Resolution of conflicts of this kind [a challenge to state regulations

statutes de novo. *Ben Ezra, Weinstein, and Co. v. America Online*, Inc., 206 F.3d 980, 984 (10th Cir. 2000). We conclude that the Kansas motor fuel tax law is not inconsistent with the Indian Trader Statutes.[11]

> allegedly preempted by the trader statutes] does not depend on rigid rules or on mechanical or absolute conceptions of state or tribal sovereignty, but instead on a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

512 U.S. 61, 73, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994) (internal brackets and quotations omitted).

[11] As a preliminary matter, we note that the actual Indian traders subject to the motor fuel tax, *i.e.*, the wholesale fuel distributors, are not parties to this suit. Thus, the question of their joinder necessarily arises, *see* Fed.R.Civ.P. 19, and we address it sua sponte. While it might have been preferable to join the distributors as parties in the district court (at least for purposes of adjudicating the question of the traders statutes' applicability), neither the State nor the Tribes ever raised that possibility over the course of four years of district court litigation. Nor did the distributors, who surely are apprised of this litigation, seek to intervene. While the distributors appear to be necessary parties under Rule 19(a), they technically are not indispensable parties under Rule 19(b) because their joinder appears feasible, that is to say the distributors may be joined without destroying our subject matter jurisdiction over this cause. *See Provident Tradesmens Bank v. Patterson*, 390 U.S. 102, 118-119 & n. 15, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

Nevertheless, at this late date we are unwilling to require the distributors' joinder because pragmatic considerations dictate otherwise. *See id.* at 106-107, 88 S.Ct. 733. First, the State is foreclosed from asserting the non-joinder issue for the first time on appeal and cannot now be heard to complain of possible relitigation with the distributors or possible inconsistent obligations. *See id.* at 110, 88 S.Ct. 733; *Martin v. Wilks*, 490 U.S. 755, 765, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (burden is on the parties to a lawsuit to join necessary additional parties). Second, any judgment we render regarding the trading statutes is nonbinding as to the distributors in the context of res judicata. *See Provident Tradesmens*, 390 U.S. at 110, 88 S.Ct. 733. Third, the

Consistent with its power under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, Congress enacted the Indian Trader Statutes "to prevent fraud and other abuses by persons trading with Indians." *Milhelm Attea*, 512 U.S. at 70, 114 S.Ct. 2028. The statutes give the Commissioner of Indian Affairs seemingly broad power to regulate trade with Indian tribes. Specifically, 25 U.S.C. § 261 states:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

In *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965), the Court interpreted the trader statutes to bar state taxation of federally licensed retail Indian traders "*on their sales to reservation Indians on a reservation.*" *Id.* at 690, 85 S.Ct. 1242 (emphasis added). *See also Central Machinery Co. v. Arizona Tax Comm'n*, 448 U.S. 160, 161-66, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980) (barring the state from taxing unlicensed retailer's sale of farm machinery to the tribe on its reservation). Subsequently, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), the Court held that a comprehensive federal regulatory scheme (unrelated to the trader statutes) governing the harvest of Indian timber preempted Arizona's "use fuel" tax law as applied to a logging contractor operating exclusively on federal and tribal roads within the reservation. *Id.* at 145-53, 100

---

preference for joinder in the district court on efficiency grounds has all but disappeared at this late date. *See id.* at 116, 88 S.Ct. 733. We simply find no compelling reason to set aside the district court's judgment in this case on the basis of the distributors' non-joinder "just because [the judgment] did not theoretically settle the whole controversy." *Id.*

S.Ct. 2578. Balancing the parties' respective interests, the Court concluded:

> The roads at issue have been built, maintained, and policed exclusively by the Federal Government, the Tribe, and its contractors. We do not believe that [the State's] generalized interest in raising revenue is in this context sufficient to permit its proposed intrusion into the federal regulatory scheme with respect to the harvesting and sale of tribal timber.

Id. at 150, 100 S.Ct. 2578.

More recently, in *Milhelm Attea*, the Court narrowed its interpretation of the trader statutes. In that case, the Court upheld a state regulatory scheme that imposed recordkeeping requirements and quantity limitations on cigarette wholesalers who sold untaxed cigarettes to reservation Indians. The Court relied on its decisions in *Moe*, 425 U.S. at 463, 96 S.Ct. 1634, and *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), to reject "the submission that 25 U.S.C. § 261 bars any and all state-imposed burdens on Indian traders." *Milhelm Attea*, 512 U.S. at 74, 114 S.Ct. 2028. In *Moe*, 425 U.S. at 481-83, 96 S.Ct. 1634, the Court upheld Montana's requirement that tribal retailers collect a cigarette sales tax validly imposed on non-Indian consumers. In *Colville*, 447 U.S. at 150-161, 100 S.Ct. 2069, the Court upheld the State of Washington's similar but more detailed tobacco sales tax against a tribal challenge. From these decisions, the Court reasoned that "[i]t would be anomalous to hold that a State could impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves, but that similar burdens could not be imposed on wholesalers

who often . . . are not." *Milhelm Attea*, 512 U.S. at 74, 114 S.Ct. 2028.[12]

Our en banc decision in *O'Cheskey*, 625 F.2d at 967, decided after *Warren Trading* and *Central Machinery*, is consistent with the Supreme Court's narrowing of the Indian Trader Statutes in *Milhelm Attea*. In *O'Cheskey*, the State of New Mexico imposed its gross receipts tax on contractors who had done construction work for the Mescalero Apache Tribe on reservation lands. We upheld the tax on the contractors despite the presence of an indemnity agreement under which the tribe agreed to indemnify the contractors for the tax. *O'Cheskey*, 625 F.2d at 969. Rejecting the tribe's argument that the Indian Trader Statutes preempted the state tax, *id.* at 990-91, we noted that nothing in the record indicated the contractors performed all their work on the reservation. *Id.* at 968. We reasoned that the legal incidence of the tax was on the contractors, and concluded:

> An indirect burden obviously is initially on the one for whom the services are performed-thus on the Tribe or the Government. However, it is equally apparent that this indirect burden is again passed on to the users of the resort

---

[12] In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the Court held that sovereign immunity barred the State of Oklahoma's suit against a tribe to recover cigarette taxes owed for sales to non-Indians at the tribe's convenience store located on the reservation. In addressing alternative remedies for the State, the Court stated:

> [U]nder today's decision, *States may of course collect the sales tax from cigarette wholesalers*, either by seizing unstamped cigarettes off the reservation, *Colville, supra*, at 161-162, 100 S.Ct. 2069, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (C.A.10 1990).

Citizen Band, 498 U.S. at 514, 111 S.Ct. 905 (emphasis added).

> and again by them. The tax becomes dispersed. There is no way of telling where the ultimate economic burden falls. This is the reason why the initial incidence of the tax must be the determinative factor. It is the only significant matter for our consideration.

O'Cheskey, 625 F.2d at 970.

Unlike *Warren Trading* and its progeny, the Kansas motor fuel tax law does not impose a tax upon retail traders for trading with Indians. *Milhelm Attea*, 512 U.S. at 74, 114 S.Ct. 2028. Unlike *White Mountain Apache Tribe*, no comprehensive federal regulatory scheme governs the wholesale distribution of motor fuel to Indian tribes. Rather, the Kansas motor fuel tax law imposes a non-discriminatory tax on all wholesale fuel distributors for fuel distributions to retailers within the State of Kansas-Indian or otherwise. Nothing in the record indicates the Tribes' distributors distribute all their fuel, or even a significant portion of it, to the Tribes. *See O'Cheskey*, 625 F.2d at 968. Thus, the threat of the distributors perpetrating fraud or abuse upon the Tribes appears negligible. *See Milhelm Attea*, 512 U.S. at 70, 114 S.Ct. 2028. Based upon the foregoing authorities, we conclude that the Indian Trader Statutes do not so pervade the field that they preempt the Kansas motor fuel tax, the legal incidence of which falls upon the distributors and which imposes only an indirect burden on the Tribes. The only remaining question in this case then is whether the indirect economic burden of the motor fuel tax constitutes such an interference with the Tribes' internal affairs as to be unlawful under *Chickasaw Nation*'s balancing of interests test.

3.

The district court concluded that the balance of tribal and state interests weighed in favor of the Tribes because (1) the State "would clearly not suffer a great deal of harm if it were enjoined from collecting the tax" on fuel distributed to the

tribal retailers, but (2) if imposed, the tax "will have a real and direct impact on the tribes' incomes." *Sac and Fox Nation*, 31 F.Supp.2d at 1307. Accordingly, the court granted the Tribes' motion for summary judgment and invalidated the motor fuel tax "as it relates to transactions involving tribal retailers." *Id.* at 1308. We review the grant of summary judgment de novo. *Seamons v. Snow*, 206 F.3d 1021, 1026 (10th Cir.2000). We conclude the district court overlooked the dictates of Supreme Court precedent and thus failed to adequately develop the factual record before balancing the parties' respective interests.

The Tribes' primary argument in this case is economic. *See* Aples' App. at 20-49 (affidavits of tribal members). The Tribes assert that the motor fuel tax jeopardizes their retail fuel sales and other revenues generated by those sales at their convenience stores located on tribal lands which support essential tribal services to their members. Both the Sac and Fox and Kickapoo Tribes also impose a tribal tax on their retail sale of fuel, generating still further revenues. According to the Tribes, if the State is allowed to tax the Tribes' fuel distributors, the wholesale cost of fuel to the Tribes will necessarily increase and the revenues from their retail stores will correspondingly decrease, interfering with their sovereign right to self-government.

This is largely the same argument the Supreme Court addressed and rejected in *Colville*, 447 U.S. at 154-59, 100 S.Ct. 2069, where the State of Washington sought to impose a cigarette sales tax on on-reservation purchases by nonmembers of the Tribes. In *Colville*, the Court phrased the issue as "whether an Indian tribe ousts a State from any power to tax on-reservation purchases by nonmembers of the tribe by imposing its own tax on the transactions or by otherwise earning revenues from the tribal business." *Colville*, 447 U.S. at 138, 100 S.Ct. 2069. The Court phrased the Tribes' argument as follows:

> If the State is permitted to impose its taxes, the Tribes will no longer enjoy any competitive advantage vis-a-vis businesses in surrounding areas. Indeed, because the Tribes themselves impose a tax on the transaction, if the state tax is also collected the price charged will neces-sarily be higher and the Tribes will be placed at a competitive *disadvantage* as compared to businesses elsewhere. Tribal smokeshops will lose a large percent-age of their cigarette sales and the Tribes will forfeit substantial revenues. Because of this economic impact, it is argued, the state taxes are (1) pre-empted by federal statutes regulating Indian affairs; (2) inconsistent with the principle of tribal self-government; and (3) invalid under negative implications of the Indian Commerce Clause.

Id. at 154, 100 S.Ct. 2069 (emphasis in original). The Court was unpersuaded:

> It is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the tribes have a significant interest. What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservations borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

Id. at 155, 100 S.Ct. 2069.

We are well aware that the tax at issue in *Colville* was a sales tax imposed down stream on purchases made by non-tribal consumers only. Because the legal incidence of the tax in *Colville* fell on the purchaser, the state had no power to tax tribal members making purchases on the reservation. *See Chickasaw Nation*, 515 U.S. at 453, 115 S.Ct. 2214. In our case, the legal incidence of the motor fuel tax is imposed up stream on the wholesale distributor and no exemption is allowed for retail fuel sales to tribal members.[13] Important similarities, however, also exist between *Colville* and this case- (1) a tax the legal incidence of which falls on non-Indians and (2) tribal complaints based on the realities of the marketplace. In both cases, the ultimate economic burden of the tax most assuredly falls on the consumer.

We acknowledge that Kansas' motor fuel tax law as presently applied *might* sweep too broadly. In other words, if a substantial portion of the Tribes' retail fuel sales are to tribal members, the Tribes' argument that the indirect burden of the fuel tax improperly interferes with their internal affairs would not be without force. Based on the record before us, however, we are unable to discern what portion of tribal fuel sales are to tribal members as opposed to consumers traveling from outside Indian land.[14] *Compare Colville*, 447 U.S. at 145, 100 S.Ct.

---

[13] A prior version of the motor fuel tax law exempted from the tax-

> The sale or delivery of motor-vehicle fuel . . . to the United States of America and such of its agencies as are not or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel . . . is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel . . . is sold or delivered to a nonmember of such reservation.

Kan. Stat. Ann. § 79-3408g(d)(2) (1997) (repealed).

[14] In his affidavit, Corbin Shuckahosse, Chairperson of the Sac and Fox Nation, states:

2069 (noting that Indian tobacco dealers made a "large majority" of their reservation sales to non-Indians seeking to take advantage of the claimed tribal exemption from the state's cigarette sales tax).

While we are not unsympathetic to the Tribes' quandary, the Supreme Court has never "gone so far as to grant tribal enterprises selling goods to nonmembers an artificial competitive advantage over all other businesses." *Colville*, 447 U.S. at 155, 100 S.Ct. 2069. In fact, a tax on non-Indians "may be valid even if it seriously disadvantages or eliminates the Indian retailer's business with non-Indians." *Id.* at 151, 100 S.Ct. 2069 "[T]he Tribes have no vested right to a certain volume of sales to non-Indians, or indeed to any such sales at all." *Id.* at 151 n. 27, 100 S.Ct. 2069.

To be sure, the Tribes have an interest in raising revenues to support essential tribal services to benefit their members. "That interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services." *Id.* at 156-57, 100 S.Ct. 2069. At the same time, "Congress

---

> [T]he pricing of the [Tribe's] fuel draws customers into the Trad'N Post, as the sale of other miscellaneous items at the Trad'N Post . . . is also attributable to the fuel sales. Without the draw of the lost-cost fuel, customers would no longer bring their business to the Trad'N Post, and the additional revenue would be lost to the Nation.

Aples' App. at 21. Similarly, Nancy Bear, Chairperson of the Kickapoo tribe, attests-

> [T]he sale of [fuel and oil] products draws customers and creates business that also generates the sale of other miscellaneous items. . .. Without the draw of the sale of fuel at a competitive price, customers would no longer bring their business to the Kickapoo Tribe Trading Post and the additional revenues from the trading post would be lost to the Tribe.

Id. at 25.

has made it clear in no uncertain terms that a state has a special and fundamental interest in its tax collection system." *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178, 1193 (10th Cir.1998). A state's interest is "strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services." *Colville*, 447 U.S. at 157, 100 S.Ct. 2069.[15]

Like the tribe's cigarette sales in *Colville*, in this case the revenues resulting from the Tribes' retail fuel sales to non-Indian consumers traveling from outside Indian lands is not derived from value "generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 155, 100 S.Ct. 2069. Although the result of the motor fuel tax may be to lessen, or even eliminate, tribal commerce with non-members, that market exists only because of the Tribes' claimed exemption from the fuel tax. *See id.* at 157, 100 S.Ct. 2069. However, until the Tribes provide us with verifiable projections based upon historic statistics indicating what portion of the Tribes' retail fuel sales is made to tribal members as compared to the general public, *see Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 128, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993) (remanding for a determination of "whether the tribal members on whom Oklahoma attempts to impose its income and motor vehicle fuel taxes live in Indian country"), and what the precise economic realities of the

---

[15] The express purpose of the motor fuel tax appears to benefit all who use the public highways in the State of Kansas-wholesalers who deliver the fuel over state highways, retailers whose businesses are located on or near state highways, and consumers who drive on state highways:

> **Purpose of tax**. The tax imposed by this act is levied for the purpose of producing revenue to be used by the state of Kansas to defray in whole, or in part, the cost of constructing, widening, purchasing of right-of-way, reconstructing, maintaining, surfacing, resurfacing and repairing the public highways . . . and for no other purpose whatever.

Kan. Stat. Ann. § 79-3402 (1999 Supp.).

situation are both in the presence and absence of the motor fuel tax, we cannot adequately balance the federal, tribal, and state interests as Supreme Court authority at this point requires.[16] *But see Colville*, 447 U.S. at 176-181, 100 S.Ct. 2069 (Rehnquist, J., dissenting in part) (criticizing the balance of interests test as too fact specific and endorsing an inquiry based solely on congressional intent). In this regard, we note that on remand the burden is on the Tribes to show whether and to what extent the motor fuel tax would burden commerce derived from value generated on Indian lands. *See id.* at 157-58, 100 S.Ct. 2069 (placing burden on the tribe to show that absent a credit for tribal taxes paid, business at the smokeshops would be significantly reduced).

Accordingly, the judgment of the district court is REVERSED and this cause REMANDED for further proceedings consistent with this opinion.

---

[16] Because the district court considered only the enforceability of the Kansas motor fuel tax on its face, we do not address the question of whether the tax, even if it survives *Chickasaw Nation*'s balancing test generally, is invalid insofar as it is applied to fuel sold by the Tribes to customers who are tribal members and reservation residents. *See Moe*, 425 U.S. at 480-81, 96 S.Ct. 1634. We leave consideration of that question in the first instance to the district court on remand.

IN THE UNITED STATE DISTRICT COURT FOR THE DISTRICT OF KANSAS.

SAC AND FOX NATION OF MISSOURI, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs,

v.

Karla PIERCE, Secretary, Kansas Department of Revenue, Defendant.

No. Civ.A. 95-4152-DES.

March 15, 1999.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on the defendant's Motion for Reconsideration (Doc. 103) of the court's Memorandum and Order dated December 17, 1998, which granted the plaintiffs' motion for summary judgment and denied the defendant's motion for summary judgment. Both parties have submitted briefs on this matter and the court is ready to rule.

I. FACTUAL BACKGROUND

The plaintiffs, who are all federally recognized Indian tribes located in the state of Kansas, filed suit seeking an injunction to prevent the defendant from collecting taxes from motor-fuel distributors for fuel sold to the plaintiffs. On December 17, 1998, the court issued an order granting the plaintiff's motion for summary judgment and denying the defendant's motion for

summary judgment. The court also issued a permanent injunction against the defendant, preventing the collection these taxes. The defendant filed the current motion asking the court to reconsider its previous order.

II. STANDARD FOR A MOTION FOR RECONSIDERATION

A motion for reconsideration provides the court with an opportunity to correct "manifest errors of law or fact and to review newly discovered evidence." *Dees v. Wilson*, 796 F.Supp. 474, 475 (D.Kan.1992). A court has discretion whether to grant or deny a motion for reconsideration. *Hancock v. City of Oklahoma City*, 857 F.2d 1394, 1395 (10th Cir.1988). There are three circumstances in which a court may appropriately grant a motion for reconsideration: (1) where the court made a manifest error of fact or law; (2) where there is newly discovered evidence; and (3) where there has been a change in the law. *Renfro v. City of Emporia, Kan.*, 732 F.Supp. 1116, 1117 (D.Kan.1990).

A motion for reconsideration is not to be used as a vehicle for the losing party to rehash arguments previously considered and rejected. *Voelkel v. GMC*, 846 F.Supp. 1482, 1483 (D.Kan.1994). Indeed, "[a] party's failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend." *Paramount Pictures Corp. v. Video Broadcasting Sys., Inc.*, No. 89-1412-C, 1989 WL 159369, at *1 (D.Kan. Dec. 15, 1989) (citing *United States v. Carolina Eastern Chem. Co., Inc.*, 639 F.Supp. 1420, 1423 (D.S.C.1986)). Such motions are therefore not appropriate if the movant intends only that the court hear new arguments or supporting facts. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991).

III. DISCUSSION

A. Eleventh Amendment Immunity

The defendant raises four issues in the motion for reconsideration. The first basis is that the case should be dismissed for lack of jurisdiction based upon the case of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). The defendant claims that *Seminole Tribe*, along with *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186 (1998) and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997), requires the dismissal of this case based on Eleventh Amendment immunity. The court previously addressed the application of *Seminole Tribe* to this case and found that it did not provide a bar to the plaintiffs' claims. *Sac & Fox Nation of Missouri v. Lafaver* 979 F.Supp. 1350 (1997). To the extent *Ellis* relies upon *Seminole Tribe*, the court finds that it is similarly inapplicable.

The defendant's reliance on *Coeur d'Alene* is similarly misplaced. In *Coeur d'Alene*, the Court held that a federal court cannot grant prospective relief under the *Ex parte Young* doctrine when that relief implicates special sovereignty interests that results in an intrusion functionally equivalent to an award of money damages. *Ellis*, 163 F.3d at 1198. The issues in this case do not "implicate special sovereignty issues" as is required by *Coeur d'Alene*.

The court has previously ruled that this case is not barred by the Eleventh Amendment. The defendant has not produced any new legal or factual contentions which would cause the court to come to a different conclusion today. The motion for reconsideration is denied as it relates to the issue of Eleventh Amendment immunity.

B. Standing

The defendant next claims that the plaintiffs do not have standing in this case. On page 12 of the motion for reconsideration, the defendant states:

> In its December 17, 1998 Memorandum and Order, the court correctly determined that the Motor Fuel Tax Act clearly places the legal incidence of the tax on distributors, not on retailers such as plaintiffs. However, legal incidence and standing are two sides of the same coin and this case should be analyzed form that perspective.

The defendant's theory is that if the legal incidence of the tax does not fall on the tribes, they cannot have standing to bring suit. The court disagrees. The Court in *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), set out a two-prong test for determining whether taxes impacting Indian tribes are proper. The first prong of the test is to determine where the legal incidence of the tax falls. If the legal incidence of the tax is on the tribes, then the tax is invalid. If not, the courts are to move on to the second prong of the test and balance the state's interest in assessing the tax with the federal and tribal interest in barring the tax. The defendant's analysis would make this two-prong test a nullity. Under the defendant's theory, the first prong would always be dispositive of the case. If the court found that the tribes lacked standing every time the legal incidence of the tax fell on the distributor instead of the tribe, the balancing test would never come into play.

The court has previously decided that the plaintiffs do have standing to bring this case. The defendant is simply rehashing the prior arguments brought before this court. The motion for reconsideration is denied as it relates to the standing issue.

C. The Interpretation of the Organic Act and Act for Admission to the Union

The defendant has not produced any new legal or factual issues in regard to its motion to reconsider on this issue. All of the defendant's arguments were previously considered and are no basis to overturn this court's prior ruling. The defendant has asked the court to withdraw its decision on this issue as it is not necessary for the determination of the case. The court declines to do so. In the alternative, the defendant has asked the court to certify the question of whether the reservations should be considered within the state of Kansas to the Kansas Supreme Court for a ruling. The court finds that this is unnecessary and denies that request.

D. The Balancing of State, Tribal and Federal Interests

The defendant's final basis for the defendant's motion to reconsider concerns the court's analysis of the balancing of state, federal and tribal interests. Under the *Chickasaw Nation* two-prong test, the court is to balance these competing interest in determining whether to uphold a tax where the legal incidence of the tax does not fall on the Indian tribes. The court found then, as it does now, that there was sufficient evidence before the court to make a ruling on this balancing issue.

The defendant claims that according to the Report of the Parties' Planning Meeting, filed with the court on February 19, 1997, the parties agreed that if the court determined that the legal incidence of the tax did not fall on the plaintiffs, then discovery would be necessary to bring forth facts for the court to balance tribal and state interests. The defendant did not raise this issue in any of the briefs filed in support of its motion for summary judgment or in response to the plaintiffs' motion. The defendant discusses this issue in its response to the plaintiff's motion for summary judgment without once indicating that further discovery was needed. To rule that the

issue was not ready for ruling would allow the defendant to take two bites at the apple. The defendant argued its case about the balancing of interests and the court ruled against the defendant. The defendant now wants to have another shot at this issue. Because the defendant argued this issue in its response to the plaintiffs' motion for summary judgment without raising the issue of the parties agreeing to conduct further discovery, the court finds that the defendant has waived any right to rely on the parties' agreement and denies the motion for reconsideration on this issue.

IV. CONCLUSION

The defendant has not produced any additional legal arguments or factual contentions that would cause the court to reverse its earlier decision to grant the plaintiffs' motion for summary judgment and deny the defendant's motion for summary judgment. The court finds that each of the four areas the defendant claims were in error were properly decided and took into account all of the necessary facts.

IT IS THEREFORE BY THIS COURT ORDERED that the defendant's Motion for Reconsideration (Doc. 103) is denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SAC AND FOX NATION OF MISSOURI, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs,

v.

John D. LAFAVER, Secretary Kansas Department of Revenue, Defendant.

No. Civ.A. 95-4152-DES.
United States District court, D. Kansas

Dec. 17, 1998.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on defendant's Motion for Summary Judgment (Doc. 93) and plaintiffs' Motion for Summary Judgment (Doc. 94).

I. *BACKGROUND*

The basic facts in this case are not in dispute. The plaintiffs are three federally-recognized Indian Tribes: the Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). Sac and Fox is the beneficial owner of and

exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for Sac and Fox by the United States of America. Iowa is the beneficial owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the Iowa land is held in trust for Iowa by the United States of America. Kickapoo is the beneficial owner of and exercises jurisdiction over land within the Kickapoo Nation's federally recognized boundaries, which land is held in trust for Kickapoo by the United States of America. All three plaintiffs operate retail gasoline stations on their reservations, and assess tribal taxes on their motor-vehicle fuel sales.

On May 7, 1995, the Kansas Legislature passed Senate Bill 88 ("SB 88"), which is codified at Kan.Stat.Ann. § 79-3408g(d)(2).[1] Section 79-3408g(d)(2) provides as follows:

No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation.

On May 17, 1995, the legislature passed House Bill 2161 ("HB 2161"), which is codified at Kan.Stat.Ann. § 79-3408(d)(2). Section 79-3408(d)(2) contains the exemption language of section 79-3408g(d)(2), but does not contain the exception for deliveries to nonmembers of Indian reservations.

---

[1] Senate Bill 421, which was passed by the Kansas Legislature in 1998, repealed Kan.Stat.Ann. § 79-3408g. However, as this statute was applicable during a portion of the time relevant to this case, it will still be discussed.

Section 79-3408(d)(2) reads as follows: "No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation."

On September 6, 1995, the Kansas Department of Revenue ("DOR") announced its intention to begin collecting tax on motor-vehicle fuel sales from distributors to plaintiffs. Plaintiffs challenged the imposition of this tax and alleged that the Kansas statutes purporting to subject the Tribes to the state's motor-vehicle fuel tax are unconstitutional and preempted by federal law. On October 5, 1995, this court entered a temporary restraining order enjoining and restraining DOR from applying and enforcing the collection of any motor-vehicle fuel tax on tribal retail motor-vehicle fuel sales on Indian lands, including sales from distributors to plaintiffs, as outlined in Senate Bill No. 88, signed on May 7, 1995, and House Bill No. 2161, signed on May 17, 1995, and implemented on September 6, 1995. The court further ordered that the temporary restraining order would be effective until such time as the court had ruled on plaintiffs' motion for preliminary injunction. The court ordered a preliminary injunction on October 30, 1996.

II. *SUMMARY JUDGEMENT STANDARD*

A court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The rule provides that "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The substantive law identifies which facts are material. *Id.* at 248, 106 S.Ct. 2505.

A dispute over a material fact is genuine when the evidence is such that a reasonable jury could find for the nonmovant. *Id.* "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

The movant has the initial burden of showing the absence of a genuine issue of material fact. *Shapolia v. Los Alamos Nat'l Lab.*, 992 F.2d 1033, 1036 (10th Cir.1993). The movant may discharge its burden "by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) The movant need not negate the nonmovant's claim. *Id.* at 323, 106 S.Ct. 2548.

Once the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The nonmovant must go beyond the pleadings and, by affidavits or depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548 (interpreting Fed.R.Civ.P. 56(e)). Rule 56(c) requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof. *Id.* at 322, 106 S.Ct. 2548. Such a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. *Id.* at 323, 106 S.Ct. 2548.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. *See, e.g., U.S. v. O'Block*, 788 F.2d 1433, 1435 (10th Cir.1986) (stating that "[t]he court must consider factual inferences tending to

show triable issues in the light most favorable to the existence of those issues"). The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505. Essentially, the court performs the threshold inquiry of determining whether a trial is necessary. *Id.* at 250, 106 S.Ct. 2505.

III. *ANALYSIS*

A. Standing

[1] Under the United States Constitution, federal courts only have jurisdiction to hear a matter if there is a "case or controversy." U.S. Const. art. III, § 2. One element of the case or controversy requirement is that the plaintiff must establish that they have standing to sue. *Raines v. Byrd*, 521 U.S. 811, 117 S.Ct. 2312, 2317, 138 L.Ed.2d 849 (1997). The standing inquiry focuses on whether the plaintiffs are the proper parties to bring this suit. *Id.* In order to meet the standing requirements of Article III, " '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.' " *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)).

[2] The defendant claims that the plaintiffs cannot meet the threshold requirement of standing to maintain this suit. In support of this contention, the defendant states that the distributors of the motor-vehicle fuel are the proper party because they are responsible for the payment of the taxes to the state.

[3] Standing contains three requirements. First, there must be an "injury in fact"—a harm suffered by the plaintiffs that is "concrete" and "actual or imminent." The second requirement is causation—a traceable connection between the plaintiffs'

injuries and the defendant's actions. Finally, there must be redressability,—or a likelihood that the requested relief will redress the alleged injury. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1016-17, 140 L.Ed.2d 210 (1998).

The court finds that the plaintiffs in this action meet the constitutional requirements for standing. The court has no doubt that the tax in question will be passed along to the tribal retailers if it is paid by the distributors. As discussed below, this is specifically allowed by the laws in question. The plaintiffs would then be left with two choices. First, the tribe could pass the tax along to the consumer, which would raise the price of fuel and undoubtedly lower sales. The other option would be to absorb the tax themselves in an effort to keep sales up. In either case, the plaintiffs would suffer a real economic loss if the tax is charged to the distributor. This satisfies the first requirement of "injury in fact." There is no causation concern in this case. Clearly it is the tax in question that would cause the plaintiffs' injuries. Finally, the court finds that by granting a permanent injunction and finding the tax in question unenforceable, the court can adequately redress the plaintiffs' injuries. Having met the three requisite showings for standing, the court finds that this case is properly brought by the plaintiffs and should proceed on its merits.

B. Tax Compacts

[4] The plaintiffs claim that the tax in question is barred by tax compacts entered into by the respective tribes and the state of Kansas. In 1991 and 1992, the respective tribal counsel, the governor of the state of Kansas, and the secretary of the Kansas Department of Revenue entered into these compacts. According to the terms of the compacts, the state agreed not to tax certain transactions which involved the tribes, provided that the tribes placed a tax on the consumers. The plaintiffs allege that these compacts prohibit the state from taxing the fuel purchased by the tribes for resale. The defendant claims

that, because these compacts were never approved or ratified by the Kansas Legislature, they have no legal effect.

As an initial note, these compacts, by their own language, were effective only until 1996, if at all. No compacts have been entered into by the tribes and the state since 1996. Therefore, this argument only pertains to the portion of the taxes in question which relate to dates prior to 1996.

The leading case in Kansas concerning the governor's ability to bind the state under a compact is *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992). In *Finney*, the Kansas Supreme Court invalidated gaming compacts entered into by then Governor Finney and certain Indian tribes located in Kansas. The court held that the compacts in question would have created substantive changes in the state's government by creating a new agency and substantively changing the state law. This, held the court, was the function of the state legislature, not the governor.

The plaintiffs claim that the *Finney* case is not controlling because it is distinguishable. One of the major concerns the Kansas Supreme Court had with the compacts at issue in *Finney* was that the compacts would create a new set of duties and responsibilities on a state agency. Clearly the *Finney* case is distinguishable on this point. The compacts in this case would have no impact on the duties or functions of any existing state agency and would not have the effect of creating a new state agency. Therefore, the court's holding that creating such additional duties on a state agency is beyond the authority of the governor does not provide any guidance when the governor does not undertake such a task, as is the case presently before the court. Another problem discussed by the court in *Finney* was that the compacts would have made substantive changes to the state laws. While the plaintiffs claim that the compacts in this case would not alter state law, the court disagrees.

Although the current compacts would not have created any new government agencies in the state of Kansas, the compacts would have made a substantive change to state law. If the compacts were to be applied as is requested by the plaintiffs in this case, the compacts would have created an exemption to the existing state tax laws. The creation of tax exemptions is function for the state legislature, not the governor. The legislature clearly considered whether certain transactions involving motor-vehicle fuel should be given a tax exemption, as evidenced by the fact that many are included in the tax statutes. To allow the governor to create new tax exemptions without the approval of the state legislature would be a violation of the Kansas Constitution. As the Kansas Supreme Court held in *Finney*, this court holds that although the governor of Kansas had the authority to negotiate the compacts in question with the Indian tribes, only the legislature has the authority to make those compacts binding. Therefore, the tax compacts at issue in this case are of no legal effect.

C. Statutory Exemptions

The plaintiffs discuss at length in their briefs that the statutes, upon which the state of Kansas is relying upon to collect the tax, exempt transactions involving Indian tribes. According to the plaintiffs, the two different provisions of Kan.Stat.Ann. § 79-3408 justify an exemption to transactions involving Indian tribes. First, the plaintiffs claim that the provision found in subsection (d)(2) of § 79-3408 allows such an exemption. According to the plaintiffs, subsection (d)(2) should be read as it appears in § 79-3408 and not as it appears in § 79-3408g. The court agrees.

This issue has become extremely confusing because the Kansas Statutes contain two versions of the same statute. Section 79-3408 was amended twice in 1995. Rather than containing only the controlling version of the statute, which the court finds is clearly the version created by House Bill 2161 as it was the latter bill to be passed into law, the bound volume of

the Kansas Statutes Annotated contains both versions. The controlling version of the statute provides an exemption from the fuel tax laws on any transactions involving "[t]he sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation." Kan.Stat.Ann. § 79-3408(d)(2) (1997) What is not contained in this version is the following language, "except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation." Kan.Stat.Ann. § 79-3408g(d)(2) (1997).

The court finds that this language is immaterial to the plaintiffs' case. The exemption at issue in § 79-3408(d)(2) applies to the United States of America and its agencies. The court is unaware of any legal authority which indicates that federally recognized Indian tribes are agencies of the United States. Plaintiffs have indicated that it was this exemption that was relied upon by the state of Kansas to exempt transactions involving tribal retailers in the past. However, the fact that the state of Kansas had erroneously interpreted the statute to provide an exemption in the past is not sufficient to require them to do so now. Kan.Stat.Ann. § 79-3408(d)(2) does not exempt from the motor-vehicle fuel tax those transactions involving retailers located on Indian reservations.

The plaintiffs also claim that Kan.Stat.Ann. § 79-3408(d)(1) provides an exemption to the motor-vehicle fuel taxes in transactions involving tribal retailers. The section states that no tax is imposed upon transactions involving "[t]he sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country." Kan.Stat.Ann. § 79-3408(d)(1) (1997).

The question which has been debated at length by both parties is whether the Indian reservations located within the

borders of the state of Kansas should be considered another "state or territory" as is provided for in § 79-3408(d)(1). The plaintiffs base their argument in the Act for Admission of Kansas Into the Union and the Organic Act. Both of these acts make it very clear to the court that the Indian reservations are not to be considered part of the state of Kansas in any way. The plain language of both acts states that "all such territory shall be excepted out of the boundaries, and constitute no part of the territory [state] of Kansas."

The defendant claims that the language contained in § 79-3408(d)(1) was not meant to exclude transactions involving Indian tribes. The statute exempts any fuel transactions where the fuel is exported "to any other state or territory or to any foreign country." From this reading, the court can only conclude that the intent of the Kansas Legislature was to exempt any transaction where fuel was to be sold outside the boundaries of the state of Kansas. As the Act for Admission of Kansas into the Union and the Organic Act both clearly exclude the Indian reservations from the boundaries of the state of Kansas, it is only reasonable that § 79-3408(d)(1) provides for an exemption to the transactions involved in this case where fuel is sold to tribal retailers on the recognized reservations.

Based on this ruling, the court finds that the plaintiff's request for a permanent injunction prohibiting the state of Kansas from taxing any and all transactions involving the sale of motor-vehicle fuel to retailers located on reservations must be granted. Although the court finds that the injunction should be granted based upon the exemptions contained in the Kansas statutes, the court will also discuss whether federal law permits the application of the tax, as well.

D. Legal Incidence of the Tax

The first step in determining whether federal law prohibits Kansas from imposing the tax in question is to determine where the legal incidence of the tax falls. *Oklahoma Tax Comm'n v.*

Chickasaw Nation, 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). If the legal incidence of the tax falls on the tribal retailers, the state will be prohibited from assessing the taxes. *Id.* at 459, 115 S.Ct. 2214. However, if the legal incidence of a tax falls on non-tribal members, then there is no categorical bar to the tax. *Id.*

In *Chickasaw Nation*, the Court found that the legal incidence of the fuel tax in question fell on the tribes, and thus held that Oklahoma could not enforce the tax. The defendant argues that the tax in question in this case is substantially different from that imposed in the *Chickasaw Nation* case and that the legal incidence of the tax is on the distributors of motor-vehicle fuels, not on the tribal retailers. The plaintiff contends that, although the two tax statutes are different in some ways, certain key elements remain in the Kansas tax which have the effect of placing the legal incidence of the tax on the tribes. The court agrees with the defendant and holds that the tax in question is legally imposed on the distributors, not on the retailers.

1. Status Prior to 1998 Amendments

In order to determine who the legal incidence of the tax is imposed upon, the court will compare some of the key provisions discussed by both the United States Supreme Court and the Tenth Circuit Court of Appeals in reaching their determination that Oklahoma's tax was legally imposed on the tribes with the Kansas law in question. In *Chickasaw Nation*, the Oklahoma tax concerned motor-vehicle fuel taxes "remitted by a distributor **on behalf of a licensed retailer.**" *Chickasaw Nation v. State of Oklahoma*, 31 F.3d 964, 971 (1994) (emphasis added). The Kansas law contains no provision which states that the distributor is remitting the tax "on behalf of a licensed retailer." In *Chickasaw Nation*, the Tenth Circuit also notes that the distributor is allowed a credit for any taxes that are uncollectible from the retailer. *Id.* Although the Kansas law does allow distributors to deduct a 2.5 percent

allowance from the amount of motor-vehicle fuel subject to taxes, it is apparent from the statute that this allowance is for losses incurred in actually handling the fuel, such as spillage, and not losses as a result of not collecting taxes from retailers as was the case in *Chickasaw Nation*.

The tribes argue that the provision in the Kansas legislation which allows distributors to pass the amount of the tax along to the tribes as part of the purchase price has the effect of imposing the legal incidence of the tax on the retailers. Initially, the court wishes to point out that this provision is not mandatory on the distributors. No distributor is required to pass the amount of tax along to the retailer. The fact that the language appears unnecessary due to the fact that the distributors would be able to pass the cost along to retailers even without the statutory authorization in no way affects the plain language of the statute. Distributors have the option of passing the tax along if they wish, but are in no way required to do so by the statute. Contrary to plaintiff's claims, this provision cannot reasonably be read to require distributors to "collect and remit" the taxes in question on behalf of the retailer.

The fact that the amount of the tax may ultimately be funneled down to the tribal retailers has no effect on the legal incidence of the tax. In the Tenth Circuit's opinion in *Chickasaw Nation*, the legal incidence of the tax did not fall on the tribal retailer because the amount of the tax would ultimately be passed along to the consumer. In response to this argument, the court stated:

> While it may well be that the tax is ultimately passed on to the consumer at the pump, the question is whether the statutes in question legally impose the taxes on the Tribe. The question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed.

Id. at 972.

Plaintiffs claim that several other provisions of the Kansas tax statutes impose the legal incidence of the taxes on the retailer. Plaintiffs claim that the provision of Kan.Stat.Ann. § 79-3408(a) which states that the tax is imposed on all fuel which is "used, sold, or delivered in this state for any purpose whatsoever" is similar to a provision in the Oklahoma tax which was relied upon by the Court to invalidate the Oklahoma tax. The court disagrees. The discussion about the similar provision in the Oklahoma tax by the Court in *Chickasaw Nation* was centered around the issue of whether the retailer could be considered a mere collection agent for the consumer just as the distributor was a collection agent for the retailer. That analysis is irrelevant here because the court has already determined that, under the Kansas law, the distributor is not acting as a collection agent of the retailer, thus making a determination of whether the retailer was, in turn, simply a collection agent for the consumer unnecessary.

Another provision of the Kansas law which Plaintiff claims is an indication that the legal incidence of the tax falls on the Tribal retailers is the exemption from taxes on sales between distributors, Kan.Stat.Ann. § 79-3408(d)(5). In *Chickasaw Nation*, the Court construed a similar provision of the Oklahoma tax to indicate that the legal incidence fell on the retailer not the distributor. However, after reading § 79-3408 as a whole, the court comes to a different conclusion in regard to the Kansas exemption. Section 79-3408(c) states "[s]uch tax shall be paid but once." If sales between distributors were not given an exemption from the fuel tax, each transfer of the fuel between distributors would result in a tax assessment for the amount of fuel transferred. This would clearly lead to multiple taxes on the same fuel as it is passed from distributor to distributor and eventually to a retailer. The court finds that the provision of the Kansas tax which exempts sales between

distributors serves the purpose of preventing multiple taxation, and not imposing the legal incidence of the tax on the retailer.

The plaintiffs further point to several provisions of the Kansas Session Laws which they claim places the legal incidence of the tax on the retailer. For example, in Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment, the plaintiffs quote the following passage from the Kansas Session Laws:

> It shall be unlawful for any . . . retailer to: (3) fail, neglect or refuse to pay the director within the time required by the act, any tax, taxes, interest or penalties for which such person is liable under the provisions of this act.

1995 Kan.Sess.Laws Ch. 262, § 11. The eliminated portion of this bill states that it applies to any "distributor, importer, exporter, manufacturer, retailer, user, carrier, transporter or any other person." *Id.* The full text of the section also lists seventeen other actions which are made illegal by the bill. Clearly, some of these eighteen illegal acts pertain to only certain groups enumerated in the bill. The language of subsection (3), on which the plaintiffs rely, does not, in any way, impose a tax liability on the retailer. The section states that it is unlawful for any person to "fail, neglect or refuse to pay the director, within the time required by this act, any tax, taxes, interest or penalties *for which such person is liable under the provisions of this act.*" *Id.* (Emphasis added). This provision does not create or impose any tax liability on any person or entity. Rather, it makes it a criminal offense not to pay taxes that are required under the act. Therefore, unless some other provision in the act places a direct tax burden on the retailer, this section does not apply to retailers.

The next section of the Kansas law which the plaintiffs claim imposes the fuel tax on the retailer is quoted by the plaintiffs as follows:

> If any . . . retailer . . . shall fail, neglect, or refuse to render any report required by the provisions of this act within the period specified, or if the director is not satisfied of the correctness of any report or tax payment made by any . . . retailer . . . the director is hereby authorized and empowered to determine . . . the true amount of taxes, penalties, and interest due the state from such . . . retailer . . . . Promptly after making such determination the director shall send . . . a statement to such . . . retailer and shall proceed to collect the amount so determined.

1995 Kan.Sess.Laws Ch. 262, § 33. When read in context, this provision does not impose any tax liability on the retailers. The section applies to any "distributor, manufacturer, importer, exporter or retailer." *Id.* This provision does not impose a tax liability on anyone. It simply gives the director the ability to use any information in the director's possession to determine the correct amount of tax that is owing on the sale of motor-vehicle fuels when an improper amount has been paid. Because no other provision in the act requires the retailer to pay these taxes, the portion pertaining to taxes in this section of the bill does not apply to retailers. However, retailers are required to file reports on the amount of fuel received, thus explaining the inclusion of retailers in this section.

Plaintiffs quote a third section of the Kansas Session Laws which, they claim, imposes the Kansas fuel taxes on the retailer. This section is quoted by the plaintiffs as follows:

> Whenever any . . . retailer . . . is 10 days delinquent in the making of any such report or the payment of any such tax, penalty, or interest . . . the director upon conducting a hearing as provided in this section and upon finding to the director's satisfaction upon such hearing, that such retailer . . . has been delinquent, or has violated provisions of this act, may revoke any or all licenses issued to such . . . retailer.

1995 Kan.Sess.Laws Ch. 262, § 29. As with the other sections of this bill cited by the plaintiffs, the court finds that, despite the plaintiffs' artful method of selectively quoting the law so as to take the quote completely out of context, this section does not impose the tax in question on retailers. The section states that when any "distributor, manufacturer, importer, exporter or retailer" fails to either pay taxes that are required to be paid, or to file required reports, the director can repeal their licenses. It does not require anyone to pay taxes. Instead, it gives the director power to enforce the tax scheme. As has been stated above, and clearly provided in the Kansas laws, the retailers are required to make reports concerning the amount of fuel they receive, but not to pay or remit any taxes. Therefore, this section of the law is only applicable to retailers insomuch as it relates to the failure to make the required reports. It clearly does not impose the legal incidence of any taxes on the retailer.

2. After 1998 Amendments

In 1998, the Kansas Legislature amended the Kansas tax laws in an effort to clarify where the legal incidence of the motor-vehicle fuel tax fell. These amendments remove most of the language concerning retailers complained of by the plaintiffs in the above section. In addition, the new version of Kan.Stat.Ann. § 79-3408 states:

> Unless otherwise specified in K.S.A. 79-3408c, and amendments thereto, the incidence of this tax is imposed on the distributor of the first receipt of the motor fuel. . ..

1997 Kan.Sess.Laws Ch. 421, § 2.

The court has found nothing in the Kansas tax laws, either prior to or after the 1998 amendments, which places the legal incidence of this tax on the retailer. Rather, the statutes are extremely clear in providing that the tax in question is imposed upon the distributor. This, however, does not end the analysis of whether the tax in question should be upheld. Even if the legal incidence of the tax does not fall on the tribal retailers, the

court can still invalidate the tax upon a finding that federal and tribal interests in not having the tax enforced outweighs the interests of the state of Kansas in collecting such taxes. *See Chickasaw Nation*, 515 U.S. at 459, 115 S.Ct. 2214 (holding that a balancing test is used to determine the validity of the tax when the legal incidence of the tax does not fall on the tribe).

F. Balancing of Federal, Tribal and State Interests

The first step in analyzing the balancing test is determining what impact would be sustained by the state of Kansas if the tax in question is invalidated. As an initial point, the court wishes to stress that Kansas has never in the past taxed motor-vehicle fuel transactions involving the Indian tribes. A ruling invalidating the tax would not take money out of the state coffers that had been relied upon in the past. Instead, it would only result in a prohibition on collecting new taxes. In addition, although no evidence is currently before the court concerning what percentage of motor-vehicle fuel sales involve tribal retailers, it is obvious to the court that such transactions make up a very small part of the transactions which would fall under the taxing statute. Invalidating the tax as it applies to transactions involving tribal retailers would not undermine the taxing scheme set up by the tax laws. The state of Kansas would clearly not suffer a great deal of harm if it were enjoined from collecting the tax in question.

The second step in the balancing test would be to determine the impact of the tax on the tribal retailers. It is clear to the court that the each of the plaintiffs in this case rely heavily on the sale of motor-vehicle fuel on their reservations for income. The court has no doubt that the distributors who provide the fuel to the tribal retailers will pass the price of the tax on as a portion of the price. In fact, this practice is specifically authorized in the legislation. *See*, Kan.Stat.Ann. § 79-3409 (1997). This will leave the tribal retailers with two options: continue to sell the motor-vehicle fuel at the same cost and absorb the cost of the tax that is passed on to them, or pass the

tax on to the consumer by increasing prices, which will in all likelihood reduce sales. In either case, the tax will have a real and direct impact on the tribes' incomes. The court finds that the balancing test discussed in *Chickasaw Nation* shows that the tax must be invalidated. The impact the loss of revenue would have on tribal functions would be much greater than the impact on the state of Kansas. Tribal autonomy is an important concern not only for the tribes, but for the federal government as well. Without sufficient revenue, tribal autonomy would clearly be compromised. For this reason, the court finds that the tax in question must be invalidated as it relates to transactions involving tribal retailers.

IV. *CONCLUSION*

Having examined the motions and briefs filed in this case, the court makes the following findings and conclusions. The court finds that the plaintiffs have met the constitutional requirement of standing to bring this lawsuit. The court also finds that the tax compacts entered into between the governor of the state of Kansas and the plaintiffs are of no legal effect. However, Kan. Stat. Ann. § 79-3408(d)(1) provides an exemption from taxation for transactions where motor-vehicle fuel is sold to retailers located on Indian reservations.

As a separate basis for granting the injunction, the court finds that although the legal incidence of the tax in question falls upon the distributors of the motor-vehicle fuel, and not on the tribal retailers, the interests of the plaintiffs in not having the taxes collected far outweighs the interests of the state of Kansas in collecting the tax on transactions involving Indian tribes.

IT IS THEREFORE BY THIS COURT DECLARED that Kan.Stat.Ann. § 79-3408 is invalid insomuch as it applies to the collection of taxes on any and all transactions involving the sale of motor-vehicle fuels to all federally recognized Indian

tribes which in turn sell the fuel as a retailer on reservations and trust land located within the state of Kansas.

IT IS THEREFORE BY THIS COURT ORDERED that plaintiffs' Motion for Summary Judgment (Doc. 94) is granted and defendant's Motion for Summary Judgment (Doc. 93) is denied.

IT IS FURTHER ORDERED that the State of Kansas is permanently enjoined from enforcing Kan. Stat. Ann. § 79-3408 and collecting taxes from distributors on the sale of motor-vehicle fuel in all transactions involving the federally recognized Indian tribes who are plaintiffs to this action.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

SAC AND FOX NATION OF MISSOURI, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs,

v.

John D. LaFAVER, Secretary Kansas Department of Revenue, Defendant.

Civil Action No. 95-4152-DES.

Feb. 12, 1998.

MEMORANDUM AND ORDER

SAFFELS, Senior District Judge.

This matter is before the court on defendant's Motion for Reconsideration (Doc. 72). For the reasons set forth below, defendant's motion is denied.

I. BACKGROUND

The plaintiffs are three federally-recognized Indian Tribes: The Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). Sac and Fox is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for Sac and Fox by the United States of America. Iowa is the beneficial owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the Iowa land is held in trust for Iowa by the United States of America. Kickapoo

is the beneficial owner of and exercises jurisdiction over land within the Kickapoo Nation's federally recognized boundaries, which land is held in trust for Kickapoo by the United States of America. All three plaintiffs operate retail gasoline stations on their reservations, and assess tribal taxes on their motor fuel sales.

On May 7, 1995, the Kansas Legislature passed Senate Bill 88 ("SB 88"), which is codified at Kan.Stat.Ann. § 79-3408g(d)(2). Section 79-3408g(d)(2) provides as follows:

> No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation.

On May 17, 1995, the legislature passed House Bill 2161 ("HB 2161"), which is codified at Kan.Stat.Ann. § 79-3408(d)(2). Section 79-3408(d)(2) contains the exemption language of section 79-3408g(d)(2), but does not contain the exception for deliveries to nonmembers of Indian reservations. Section 79-3408(d)(2) reads as follows: "No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation."

On September 6, 1995, the Kansas Department of Revenue ("DOR") announced its intention to begin collecting tax on motor fuel sales on Indian lands, including sales from distributors to plaintiffs. Plaintiffs challenged the imposition of

this tax and alleged that the Kansas statutes purporting to subject the Tribes to the state's motor fuels tax are unconstitutional and preempted by federal law. On October 5, 1995, this court entered a temporary restraining order enjoining and restraining DOR from applying and enforcing the collection of any motor fuels tax on tribal retail motor fuel sales on Indian lands, including sales from distributors to plaintiffs, as outlined in Senate Bill No. 88, signed on May 7, 1995, and House Bill No. 2161, signed on May 17, 1995, and implemented on September 6, 1995. The court further ordered that the temporary restraining order would be effective until such time as the court had ruled on plaintiffs' motion for preliminary injunction.

After several requests for continuance from the parties, the court heard arguments on the preliminary injunction on September 30, 1996. On October 30, 1996, the court granted plaintiffs' Motion for Issuance of Preliminary Injunction (Doc. 3) and enjoined DOR from applying or enforcing the Kansas motor fuels tax on motor fuel sales on Indian lands, including sales from distributors to the Tribes, as implemented on September 6, 1995, pending adjudication of the plaintiffs' claims. On October 31, 1996, defendant LaFaver moved to dismiss the action, pursuant to Fed.R.Civ.P. 12(b)(1), for lack of jurisdiction. This court issued a Memorandum and Order on September 4, 1997, denying defendant's motion to dismiss. Defendant now moves the court to reconsider its September 4, 1997, order, or, alternatively, to permit defendant to file an interlocutory appeal to the Tenth Circuit Court of Appeals.

II. DISCUSSION

A motion for reconsideration provides the court with an opportunity to correct "manifest errors of law or fact and to review newly discovered evidence." *Dees v. Wilson*, 796 F.Supp. 474, 475 (D.Kan.1992), *aff'd*, 13 F.3d 405 (1993). A court has discretion whether to grant or deny a motion for reconsideration. *Hancock v. City of Oklahoma City*, 857 F.2d

1394, 1395 (10th Cir.1988). There are three circumstances in which a court may appropriately grant a motion for reconsideration: (1) where the court made a manifest error of fact or law; (2) where there is newly discovered evidence; and (3) where there has been a change in the law. *Renfro v. City of Emporia, Kan.*, 732 F.Supp. 1116, 1117 (D.Kan.), *aff'd*, 948 F.2d 1529 (1991).

A motion for reconsideration is not to be used as a vehicle for the losing party to rehash arguments previously considered and rejected. *Voelkel v. GMC*, 846 F.Supp. 1482, 1483 (D.Kan.), *aff'd*, 43 F.3d 1484 (10th Cir.1994). Indeed, "[a] party's failure to present his strongest case in the first instance does not entitle him to a second chance in the form of a motion to amend." *Paramount Pictures Corp. v. Video Broadcasting Sys., Inc.*, No. 89-1412-C, 1989 WL 159369, at *1 (D.Kan. Dec.15, 1989) (citing *United States v. Carolina Eastern Chem. Co., Inc.*, 639 F.Supp. 1420, 1423 (D.S.C.1986)). Such motions are therefore not appropriate if the movant intends only that the court hear new arguments or supporting facts. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991), *cert. denied*, 506 U.S. 828, 113 S.Ct. 89, 121 L.Ed.2d 51 (1992).

"The party moving for reconsideration has the 'burden to show that there has been a change of law, that new evidence is available, or that reconsideration is necessary to correct clear error or prevent manifest injustice.'" *Mackey v. IBP, Inc.*, No. 95-2288-GTV, 1996 WL 417513 at *2 (D.Kan. July 22, 1996) (quoting *International Bhd. of Teamsters, Local 955 v. Sambol Meat Packing Co.*, No. 92-2338-JWL, unpublished op. at 2 (D.Kan. Sept. 30, 1993)). Here, defendant does not allege a change in law or the availability of new evidence. Accordingly, his arguments require the court to decide whether reconsideration is necessary to correct any clear error or prevent manifest injustice.

The court finds no proper grounds for reconsideration. Although defendant disagrees with the court's interpretation of the law, his arguments do not establish the court's prior ruling to be "clearly erroneous." Nor does defendant demonstrate clear error which should be corrected to prevent manifest injustice.

The court has also examined defendant's request for permission to file an interlocutory appeal, and finds that defendant has failed to satisfy the requirements for this court to permit such an appeal. Accordingly, plaintiff's motion must be denied.

IT IS THEREFORE BY THE COURT ORDERED that defendant's Motion to Reconsider (Doc. 72) is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

SAC AND FOX NATION OF MISSOURI, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs,

v.

John D. LAFAVER, Secretary Kansas Department of Revenue, Defendant.

No. CIV.A. 95-4152-DES.

Sept. 4, 1997.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on defendant's Motion to Dismiss (Doc. 55). For the reasons set forth below, defendant's motion is denied.

I. BACKGROUND

The plaintiffs are three federally-recognized Indian Tribes: The Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). Sac and Fox is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for Sac and Fox by the United States of America. Iowa is the beneficial owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the Iowa land is held in trust for Iowa by the United States of America. Kickapoo is the beneficial owner of and exercises jurisdiction over land

within the Kickapoo Nation's federally recognized boundaries, which land is held in trust for Kickapoo by the United States of America. All three plaintiffs operate retail gasoline stations on their reservations, and assess tribal taxes on their motor fuel sales.

On May 7, 1995, the Kansas Legislature passed Senate Bill 88 ("SB 88"), which is codified at Kan. Stat. Ann. § 79-3408g(d)(2). Section 79-3408g(d)(2) provides as follows:

> No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle fuel or special fuel is sold or delivered to a nonmember of such reservation.

On May 17, 1995, the legislature passed House Bill 2161 ("HB 2161"), which is codified at Kan. Stat. Ann. § 79-3408(d)(2). Section 79-3408(d)(2) contains the exemption language of section 79-3408g(d)(2), but does not contain the exception for deliveries to nonmembers of Indian reservations. Section 79-3408(d)(2) reads as follows: "No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation."

On September 6, 1995, the Kansas Department of Revenue ("DOR") announced its intention to begin collecting tax on motor fuel sales on Indian lands, including sales from distributors to plaintiffs. Plaintiffs challenged the imposition of this tax and alleged that the Kansas statutes purporting to

subject the Tribes to the state's motor fuels tax are unconstitutional and preempted by federal law. On October 5, 1995, this court entered a temporary restraining order enjoining and restraining DOR from applying and enforcing the collection of any motor fuels tax on tribal retail motor fuel sales on Indian lands, including sales from distributors to plaintiffs, as outlined in Senate Bill No. 88, signed on May 7, 1995, and House Bill No. 2161, signed on May 17, 1995, and implemented on September 6, 1995. The court further ordered that the temporary restraining order would be effective until such time as the court had ruled on plaintiffs' motion for preliminary injunction.

After several requests for continuance from the parties, the court heard arguments on the preliminary injunction on September 30, 1996. On October 30, 1996, the court granted plaintiffs' Motion for Issuance of Preliminary Injunction (Doc. 3) and enjoined DOR from applying or enforcing the Kansas motor fuels tax on motor fuel sales on Indian lands, including sales from distributors to the Tribes, as implemented on September 6, 1995, pending adjudication of the plaintiffs' claims. Defendant now moves the court to dismiss the action, pursuant to Fed.R.Civ.P. 12(b)(1), for lack of jurisdiction.

II. 12(b)(1) MOTION TO DISMISS STANDARDS

Federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so. *Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir.1994). "A court lacking jurisdiction must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Scheideman v. Shawnee County Bd. of County Comm'rs*, 895 F.Supp. 279, 280 (D.Kan.1995) (citing *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir.1974)); Fed.R.Civ.P. 12(h)(3). The party seeking to invoke a federal court's jurisdiction sustains the burden of establishing that such jurisdiction is proper. *Id.* When federal jurisdiction is challenged, the plaintiff bears the burden of

showing why the case should not be dismissed. *Jensen v. Johnson County Youth Baseball*, 838 F.Supp. 1437, 1439-40 (D.Kan.1993).

III. DISCUSSION

Plaintiffs bring their claims for declaratory and injunctive relief pursuant to 28 U.S.C. § 1362, which grants to the district courts original jurisdiction over civil actions brought by federally-recognized Indian Tribes wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States. Here, plaintiffs assert claims arising under the Constitution and laws of the United States, particularly the Indian Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution. In support of his motion, defendant contends the court has no jurisdiction to hear this matter because plaintiffs' suit is barred by the Eleventh Amendment to the United States Constitution. Specifically, defendant argues that the Eleventh Amendment bars application of the Indian Commerce Clause to the state of Kansas.

The defendant is correct in that the Eleventh Amendment restricts suits in federal court by private parties "seeking to impose a liability which must be paid from public funds in the state treasury." *Quern v. Jordan*, 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979) (citing *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, (1974)). *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 66 S.Ct. 745, 90 L.Ed. 862 (1946). However, injunctive relief may be obtained against a state so long as the action is against a state official allegedly acting in violation of federal law. *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); *see Quern*, 440 U.S. at 337, 99 S.Ct. at 1143 ("a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law, even though such an injunction may have an ancillary effect on the state treasury."). "The

distinction between that relief permissible under the doctrine of *Ex parte Young* and that found barred in *Edelman* was the difference between prospective relief on one hand and retrospective relief on the other." *Quern*, 440 U.S. at 337, 99 S.Ct. at 1143.

This case appears to fall within the exception created under *Ex parte Young*. Plaintiffs are not seeking damages from the state of Kansas. They are instead requesting the court to enjoin the Kansas Director of Revenue to conform his future conduct to the requirements of federal law. This is the type of "prospective relief" contemplated by the Supreme Court as consistent with the Eleventh Amendment. Any ancillary effect the lawsuit may have on the Kansas treasury is irrelevant. *See Quern*, 440 U.S. at 337, 99 S.Ct. at 1143.

This conclusion is also consistent with the long line of Indian tax cases. The Supreme Court has adjudicated suits by Indian tribes and others challenging state taxation of tribal activities at least since *Worcester v. Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832). *See, e.g., Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Oklahoma Tax Com'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993); *Department of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 114 S.Ct. 2028, 129 L.Ed.2d 52 (1994). The Supreme Court recently addressed a similar issue in *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), and proscribed application of a state fuel tax comparable to the Kansas fuel tax at issue in the present action. The *Chickasaw* Court gave no indication that the Eleventh Amendment would pose any sort of restraint on the power of the federal courts to hear such a case. Indeed, in none of the numerous Indian tax cases reviewed by this court has the Supreme Court or any other federal court indicated that the

Eleventh Amendment presents any limitation that would prevent the court from hearing the instant lawsuit.

Defendant contends that the recent Supreme Court ruling in *Seminole Tribe of Florida v. Florida*, 517 U.S. 609, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) compels a different conclusion. The court disagrees. The issue in *Seminole* turned on the ability of Congress to abrogate state sovereign immunity by authorizing Indian tribes to sue states to enforce tribal statutory rights under the detailed provisions of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710 *et seq.* *Id.* The Court concluded that Congress had no such power under the Indian Commerce Clause and therefore the IGRA could not grant jurisdiction over a state that does not consent to be sued. *Id.*

The *Seminole* case did not involve, however, a situation analogous to the present case in which a state attempts to impose a tax on an Indian tribe allegedly in violation of federal law. *Id.* Nor did it involve a suit for prospective injunctive relief in order to end an alleged continuing federal-law violation. *Id.* Whether Congress has the power under the Indian Commerce Clause to enact a statute that abrogates a state's Eleventh Amendment immunity is an entirely different question than whether the Indian Commerce Clause and federal case law, absent any intervention by Congress, prohibit a state from asserting a tax on an Indian nation. It is the latter question which the *Seminole* Court had no occasion to address, and which the Supreme Court already answered in its long line of Indian tax cases. *Id.*

The court also disagrees with defendant that the *Seminole* decision somehow diluted the *Ex parte Young* doctrine as it applies to the present case. The *Seminole* Court expressly distinguished the situation in that case from that giving rise to the traditional *Ex parte Young* action. *Id.* at —, 116 S.Ct. at 1131-33. In the *Seminole* case, the "continuing violation of federal law" alleged by the petitioner was the Governor's

failure to bring the state into compliance with Section 2710(d)(3) of the IGRA. *Id.* at —, 116 S.Ct. at 1132. The *Seminole* Court noted that "Congress passed § 2710(d)(3) in conjunction with the carefully crafted and intricate remedial scheme set forth in § 2710(d)(7)," and found that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* In cases where Congress has not enacted a remedial scheme specifically designed for the enforcement of a particular right, "[a]n individual may obtain injunctive relief under *Ex parte Young* in order to remedy a state officer's ongoing violation of federal law." *Id.* at — n. 16, 116 S.Ct. at 1132 n. 16.

IT IS THEREFORE BY THE COURT ORDERED that defendant's Motion to Dismiss (Doc. 55) is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS.

SAC AND FOX NATION OF MISSOURI, Iowa Tribe of Kansas and Nebraska, Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, Plaintiffs,

v.

John D. LAFAVER, Secretary Kansas Department of Revenue, Defendant.

Civil Action No. 95-4152-DES.

Oct. 30, 1996.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on the plaintiffs' Motion for Issuance of Preliminary Injunction (Doc. 3). The plaintiffs challenge the Kansas Department of Revenue's ("DOR") imposition of a tax on motor fuel sales on Indian lands, including sales from distributors to the plaintiffs. On October 5, 1995, this court entered a temporary restraining order enjoining and restraining DOR from applying and enforcing the collection of any motor fuels tax on tribal retail motor fuel sales on Indian lands, including sales from distributors to the plaintiffs, as outlined in Senate Bill No. 88, signed on May 7, 1995, and House Bill No. 2161, signed on May 17, 1995, and implemented on September 6, 1995. The court further ordered that the temporary restraining order would be effective until such time as the court had ruled on the plaintiffs' motion for preliminary injunction.

After several requests for continuance from the parties, the court heard arguments on the preliminary injunction on September 30, 1996. At the conclusion of the hearing, the

court took the matter under advisement. Having reviewed the pleadings and the arguments of counsel, the court is now prepared to rule.

I. BACKGROUND

The plaintiffs are three federally-recognized Indian Tribes: The Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). Sac and Fox is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for Sac and Fox by the United States of America. Iowa is the beneficial owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the Iowa land is held in trust for Iowa by the United States of America. Kickapoo is the beneficial owner of and exercises jurisdiction over land within the Kickapoo Nation's federally recognized boundaries, which land is held in trust for Kickapoo by the United States of America. All three plaintiffs operate retail gasoline stations on their reservations, and assess tribal taxes on their motor fuel sales.

On May 7, 1995, the Kansas Legislature passed Senate Bill 88 ("SB 88"), which is codified at Kan.Stat.Ann. § 79-3408g(d)(2). Section 79-3408g(d)(2) provides as follows:

> No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation, except that this exemption shall not be allowed if the sale or delivery of motor-vehicle fuel or special fuel is to a retail dealer located on an Indian reservation in the state and such motor-vehicle

fuel or special fuel is sold or delivered to a nonmember of such reservation.

On May 17, 1995, the legislature passed House Bill 2161 ("HB 2161"), which is codified at Kan.Stat.Ann. § 79-3408(d)(2). Section 79-3408(d)(2) contains the exemption language of section 79-3408g(d)(2), but does not contain the exception for deliveries to nonmembers of Indian reservations. Section 79-3408(d)(2) reads as follows: "No tax is hereby imposed upon or with respect to the following transactions: . . . (2) The sale or delivery of motor-vehicle fuel or special fuel to the United States of America and such of its agencies as are now or hereafter exempt by law from liability to state taxation."

On September 6, 1995, DOR announced its intention to begin collecting tax on motor fuel sales on Indian lands. The plaintiffs allege that the Kansas statutes purporting to subject the Tribes to the State's motor fuels tax are unconstitutional and preempted by federal law.

II. DISCUSSION

To obtain a preliminary injunction, the movant must establish that:

> (1) the moving party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits.

Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992) (quoting *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir.1986)). If the moving party satisfies the first three elements, the standard for meeting the fourth requirement,

substantial likelihood of success on the merits, becomes more lenient. In such a case, the movant need only show "questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation." *Id.* at 1199. Whether to issue a preliminary injunction is committed to the sound discretion of the trial court. *Id.* at 1198.

The court found in its October 5, 1995, memorandum and order that the plaintiffs satisfied all four elements. The defendant has failed to present any argument which would require the court to reconsider its finding as to the first three elements. DOR acknowledges that the plaintiffs may face economic hardship if the preliminary injunction does not issue, but maintains that the plaintiffs' claims of lost revenue are speculative. In order to issue a preliminary injunction, however, the court need not find that the claimed injury is certain to result--a likelihood of irreparable injury is sufficient. *Bath Indus., Inc. v. Blot*, 427 F.2d 97, 111 (7th Cir.1970). Furthermore, where, as here, the plaintiffs allege deprivation of a constitutional right, no further showing of irreparable injury is generally necessary. 11A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 2948.1, at 161 (1995); *see also Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689-90, 49 L.Ed.2d 547 (1976); *Community Communications Co. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 (10th Cir.1981).

Whether the Tribes have satisfied the fourth requirement for a preliminary injunction, though, requires further analysis. The court based its October 5, 1995, order, in part, on the existence of tax compacts between DOR and the Tribes. The compacts precluded the state of Kansas from taxing transactions occurring on the reservations which were subject to tribal tax. The compacts with Iowa and Kickapoo have now expired, however, and the compact with Sac and Fox will expire on January 3, 1997.

The Tribes argue that notwithstanding the expiration of the tax compacts, the State of Kansas cannot impose its motor fuels tax on Indian reservations. The plaintiffs maintain that the Kansas Legislature sought to eliminate the tax exemption for sale of motor fuels to retail dealers on Indian reservations by passing SB 88. According to the plaintiffs, the subsequent passage of HB 2161, which did not contain the exception for sales on Indian reservations, served to repeal SB 88. The Tribes also contend that the motor fuels tax is precluded by Kan.Stat.Ann. §§ 79-3408(d)(1) and 79-3408g(d)(1). Those sections provide that "[n]o tax is hereby imposed upon or with respect to the following transactions . . . (1) The sale or delivery of motor-vehicle fuel or special fuel for export from the state of Kansas to any other state or territory or to any foreign country." The Act for Admission of Kansas Into the Union, section 1, states that "all [Indian] territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas."

The defendant counters that the legislature did not intend that HB 2161 repeal SB 88, but rather that the two bills were passed with different purposes in mind. DOR contends that the legislature passed SB 88 to clarify the fact that it did not consider Indian tribes to be agencies of the United States for purposes of the exemption, while HB 2161 was passed to curb fuel tax evasion by requiring retailers to maintain records of fuel deliveries.

The defendant argues, in the alternative, that even if HB 2161 did repeal SB 88, and even if the Tribes are considered territories under sections 79-3408(d)(1) and 79-3408g(d)(1), or agencies under sections 79-3408(d)(2) and 79-3408g(d)(2), the statutes still do not operate to exempt motor fuel sales to the Tribes. DOR maintains that sections 79-3408(a) and 79-3408g(a) tax distributors, not retailers such as the Tribes, and the exemptions thus do not apply to the plaintiffs. DOR asserts that its prior practice of exempting distributors which sold to

the Tribes from the motor fuels tax was based on the existence of tax compacts between the Tribes and the State, not on any construction of section 79-3408(d)(2) that the Tribes were exempted as agencies of the United States.

The court is not convinced that, absent SB 88, the State could impose its tax on the plaintiffs. If the Tribes are not agencies of the United States within the meaning of section 79-3408(d)(2), then the exemption contained in that statute never exempted sales to the Tribes, and the exception added by SB 88 was therefore unnecessary. The court is reluctant to interpret the statute in a manner which would render part of the statute superfluous. See *Fuller v. Norton*, 86 F.3d 1016, 1024 (10th Cir.1996). It is not necessary for the court to determine, however, whether the language of either SB 88 or HB 2161 permits the tax, in order to decide that the plaintiff has raised "questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation," *Cruce*, 972 F.2d at 1199. The court finds that there exist substantial questions as to whether the state of Kansas has jurisdiction to impose its motor fuels tax on Indian land.

"[A]bsent cession of jurisdiction or other federal statutes permitting it . . . a State is without power to tax . . . reservation Indians." *Oklahoma Tax Comm'n v. Chickasaw Nation*, — U.S. —, —, 115 S.Ct. 2214, 2220, 132 L.Ed.2d 400 (1995); *see also McClanahan v. State Tax Comm'n*, 411 U.S. 164, 177, 93 S.Ct. 1257, 1265, 36 L.Ed.2d 129 (1973) (25 U.S.C. § 1322(a) prohibits states from exercising jurisdiction over reservation Indians without the tribe's consent). On the other hand, if the legal incidence of the tax rests on non-Indians, the tax may be enforceable. *Chickasaw*, — U.S. at —, 115 S.Ct. at 2220. If the incidence of the tax does not fall on Indians, and "the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, and may place on a tribe or tribal members

'minimal burdens' in collecting the toll." *Id.* (citations omitted).

DOR maintains that the incidence of the Kansas motor fuels tax falls on the distributor, not the Indian retailer. The defendant refers the court to Kan.Stat.Ann. § 79-3410(a), which provides that "[e]very distributor, manufacturer or importer . . . shall compute and shall pay to the director . . . the amount of taxes due to the state." Like the Oklahoma motor fuels tax statute construed in *Chickasaw*, the Kansas act does not expressly identify who bears the tax's legal incidence. *Chickasaw*, 515 U.S. at —, 115 S.Ct. at 2221. Kan.Stat.Ann. §§ 79-3408(a) and 79-3408g(a) state only that "[a] tax per gallon or fraction thereof . . . is hereby imposed on the use, sale or delivery of all motor vehicle fuels or special fuels which are used, sold or delivered in this state for any purpose whatsoever." The defendant argues that the Kansas statute is distinguishable from the Oklahoma statute, however, in that the Oklahoma statute directed the distributor to remit the motor fuels tax "on behalf of a licensed retailer." *Chickasaw*, — U.S. at — —, 115 S.Ct. at 2221-22 (quoting Okla.Stat. tit. 68, § 505(C) (1991)). The Court inferred from this language that the tax obligation was legally the retailer's, not the distributor's. *Id.* at —, 115 S.Ct. at 2222.

The plaintiffs respond that the Kansas act contains a similar pass-through provision. Kan.Stat.Ann. § 79-3409 states that "[e]very distributor paying such tax or being liable for the payment shall be entitled to charge and collect such tax . . . as a part of the selling price." The plaintiffs argue that because distributors would be free to add the tax to their selling price without any statutory authorization, the inclusion of the pass-through language, coupled with the absence of comparable language entitling retailers to similarly pass along the tax to consumers, evidences the legislature's intent that the tax be born by the retailer.

The Tribes point to other sections of the Kansas tax law which also impose duties on the retailer. Section 79-3408(c) provides as follows: "Such taxes shall be paid but once. Such tax shall be computed on all motor-vehicle fuels or special fuels received by each distributor, manufacturer, importer or retailer in this state. . .." Section 79-3464e(a) provides that "[i]t shall be unlawful for any distributor, importer, exporter, manufacturer, retailer, user, carrier, transporter or any other person to: . . . fail, neglect or refuse to pay the director, within the time required by this act, any tax . . . for which such person is liable under the provisions of this act."

Some tax statutes expressly identify who bears the tax's legal incidence. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 482, 96 S.Ct. 1634, 1645, 48 L.Ed.2d 96 (1976) (Montana statute provided that cigarette tax was "conclusively presumed to be [a] direct [tax] on the retail consumer"). When the statute is not so specific, the question of legal incidence is one of interpretation of the statute as written and applied. *Chickasaw*, — U.S. at —, 115 S.Ct. at 2221. Reading the motor fuels tax act in its entirety, the court finds that the Tribes have raised sufficient questions as to the incidence of the motor fuels tax so as to render the issue a fair ground for litigation.

Even if the court were to agree with the defendant that the incidence of the tax falls on the distributor, the State might still, under *Chickasaw*, lack jurisdiction to apply its motor fuels tax on Indian land. The state may impose its tax only "if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary." *Chickasaw*, — U.S. at —, 115 S.Ct. at 2220.

The plaintiffs cite *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 100 S.Ct. 2592, 65 L.Ed.2d 684 (1980), for the proposition that the Indian trader laws, 25 U.S.C. §§ 261-264, constitute a comprehensive federal

statutory scheme which preempts the State's assessment of the motor fuels tax on Indian land. 25 U.S.C. § 261 provides that:

> [t]he Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

In *Central Machinery*, the Supreme Court held that the Indian trader laws preempted a state tax on the sale of machinery to Indian tribes. 448 U.S. at 165, 100 S.Ct. at 2596.

The plaintiffs also submit that the balance of federal, state, and tribal interests favors the Tribes. The Tribes claim that if they are forced to collect the Kansas motor fuels tax, in addition to the tribal motor fuels tax which they already charge, they will realize decreased sales and a significant loss of revenue. The Tribes project resulting unemployment and a curtailment of social and medical services on the reservations, which in turn would render Tribal members more dependent on federal assistance. The plaintiffs submit that these tribal and federal interests outweigh the State's interests. According to the plaintiffs, the State's interest in reducing tax fraud does not extend into Indian land, which was excluded from the territorial limits and jurisdiction of the state of Kansas by the Act for the Admission of Kansas Into the Union. The plaintiffs also argue that imposition of the Kansas tax on Indian land would generate minimal additional revenue for the State.

The court finds that under *Chickasaw*, the plaintiffs have raised questions concerning the incidence of the proposed tax, the balance of federal, state, and tribal interests, and preemption under federal law which are so serious, substantial, difficult and doubtful as to make such issues a fair ground for litigation.

IT IS THEREFORE BY THE COURT ORDERED that the plaintiff's Motion for Issuance of Preliminary Injunction (Doc. 3) is granted. The defendant Kansas Department of Revenue is enjoined and restrained from applying or enforcing the Kansas motor fuels tax on motor fuel sales on Indian lands, including sales from distributors to the Tribes, as implemented on September 6, 1995, pending adjudication of the plaintiffs' claims.

IT IS FURTHER ORDERED that the court has considered the issue and determined that a bond, pursuant to Fed.R.Civ.P. 65(c), is unnecessary because "there is an absence of proof showing a likelihood of harm" to the defendant. *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 782 (10th Cir.1964).

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS.**

**SAC AND FOX NATION OF MISSOURI,
Iowa Tribe of Kansas and Nebraska,
Kickapoo Tribe of Indians of the
Kickapoo Reservation in Kansas, Plaintiffs,
v.
John D. LaFAVER, Secretary
Kansas Department of Revenue, Defendant.**

Civ. A. No. 95-4152-DES.

Oct. 5, 1995.

Order Denying Remedial Relief and Denying Modification of Order Oct. 27, 1995.

MEMORANDUM AND ORDER

SAFFELS, District Judge.

This matter is before the court on the motion of the plaintiffs for a temporary restraining order and a preliminary injunction (Doc. 3). This action was filed September 25, 1995. The court heard arguments from all parties at a hearing on October 4, 1995. At the conclusion of the hearing, the court took the matter under advisement.

Having further reviewed the pleadings and the arguments of counsel, the court is now prepared to rule on the motion for a temporary restraining order.

This case is brought by three federally recognized Indian Tribes: The Sac and Fox Nation of Missouri ("Sac and Fox"); the Iowa Tribe of Kansas and Nebraska ("Iowa"); and the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas ("Kickapoo") (collectively the "Tribes"). The Sac and

Fox Tribe is the beneficial owner of and exercises jurisdiction over the Sac and Fox Indian Reservation, as well as land located at Reserve, Kansas, which land is held in trust for the Sac and Fox by the United States of America. The Iowa Tribe is owner of and exercises jurisdiction over the Iowa Tribe of Kansas and Nebraska Indian Reservation. A part of the land is held in trust for the Iowa by the United States of America. The Kickapoo Tribe is the beneficial owner of and exercises jurisdiction over land within the Kickapoo Nation federally recognized boundaries, which land is held in trust for the Kickapoo by the United States of America.

In this action, the Tribes challenge the imposition of a motor fuel tax by the Kansas Department of Revenue ("Department") on the retail sales of gasoline/diesel fuel on Indian lands. The imposition of the tax is a result of amendments to the state of Kansas' fuel tax laws passed by the Kansas Legislature on May 7, 1995, and May 17, 1995.

The Kansas Department of Revenue delayed collection of the tax for two months. However, on September 6, 1995, the Department began collecting taxes on motor fuels sold by Indians on Indian lands. All three Tribes operate gas stations on their trust land.

The Tribes raise numerous reasons why the imposition of the tax is in violation of the law. These include: (1) the Act for the Admission of Kansas Into the Union, § 1 excludes Indian land from the territorial boundaries and civil jurisdiction of the state of Kansas; (2) the Tribes have not subsequently consented to the civil jurisdiction over their respective Indian lands of the Kansas State courts; (3) unless Congress instructs otherwise, a state's excise tax is unenforceable if its legal incidence falls on an Indian tribe or its members for sales made within Indian country; and (4) all three Tribes have entered into Tax Compacts with the Department and the Governor of the state of Kansas.

The revenue generated from the sale of motor fuel is a primary revenue source for the Tribes. The imposition of the tax would severely diminish the capacity of the Tribes to fund necessary services and programs to the members of the Tribes. There is also every likelihood that Tribal employees and administrative staff in the Tribes' business offices will be laid off as a result of the lost revenue. The loss of revenue, therefore, has potentially devastating effects for people who are already impoverished. Consequently, the Tribes seek a temporary restraining order to bar the collection taxes by the Department.

The issuance of a temporary restraining order or other preliminary injunctive relief is within the sound discretion of the district court. *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 354 (10th Cir.1986). When the opposing party has been notified and a hearing held prior to the issuance of a temporary restraining order, the specific requirements of Fed.R.Civ.P. 65(b), including the ten-day limitation on the duration of such an order, do not apply. *See* 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2951, at 500 (1973). In such a case the court, in addressing a motion seeking a temporary restraining order, follows the same procedure as for a preliminary injunction motion. *Id.* at 499.

To obtain a temporary restraining order or a preliminary injunction in federal court, the movant has the burden of establishing that:

> (1) the party will suffer irreparable injury unless the injunction issues; (2) the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) the injunction, if issued, would not be adverse to the public interest; and (4) there is a substantial likelihood that the moving party will eventually prevail on the merits.

Resolution Trust Corp. v. Cruce, 972 F.2d 1195, 1198 (10th Cir.1992). If the moving party satisfies the first three elements, the standard for meeting the fourth requirement, likelihood of success on the merits, generally becomes more lenient. In such a case, the movant need only show that the issues are so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation. *See Franklin Savings Ass'n v. Office of Thrift Supervision*, 732 F.Supp. 1123, 1124-25 (D.Kan.1990).

1. Irreparable Injury. The Tribes contend that they will be irreparably harmed if the tax collection continues because the loss of revenue will result in decreased services and programs to tribal members and the loss of employment for specific Tribal members. The Tribes further contend that such devastating losses of revenue may well mean the complete elimination of social service, medical and education payments to tribal members. Even such basic services as law enforcement and fire protection may be endangered by this loss of revenue. Furthermore, the Tribes argue that if the Department is not enjoined from collecting the taxes and the Tribes win on the merits, the loss of revenue in the interim may so devastate the Tribes that the ability to sustain themselves may be irretrievably lost.

Under normal circumstances, monetary loss may be remedied by an award of compensatory damages, and the risk of such loss is therefore not considered irreparable. *See Holly Sugar Corp. v. Goshen County Coop. Beet Growers Ass'n*, 725 F.2d 564, 570 (10th Cir.1984). Here, however, the court considers the consequences of such losses as extremely serious and potentially devastating to the Tribes. Such loss would indeed meet the irreparable harm test.

2. Harm to Opposing Party. At the hearing on this matter, and in their memorandum in support, the Tribes contend that the Department will suffer little if the restraining order issues. For years the state of Kansas made no attempt to

impose fuel taxes on tribal retail sales on Indian lands and had even admitted that it had no authority to do so. The Tribes further assert that the collection of taxes, which began less than a month ago, has not resulted in a reliance on the revenue by the state.

The court also notes that the Department made no statement concerning any negative impact the loss of tax collection would have on the state's budget. In fact, in its argument, the Department alluded to the very minor role the Tribes' tax dollars would play in the state's funding scheme.

The court concludes the damage caused to the opposing party is negligible.

3. The Public Interest. The requested restraining order will not impair the public interest in the collection of revenue for the state as the Department has acknowledged that the contribution from the Tribes is minimal in the total scheme of collection from all distributors and retailers. The Department raised no public interest issue as it relates the collection of the taxes from these plaintiffs and the court finds none.

On the other hand, the public interest in assuring the continued presence of social service, public safety and education programs and benefits to the Tribes on Indian lands is significant. The public also has a genuine interest in helping to assure Tribal self-government, self-sufficiency and self-determination. Should the collection of the tax continue and the previously stated negative impact on the Tribes occur, the public interest will be ill-served by the potential influx of Tribal members into the state's social service and welfare programs.

The court's issuance of the requested order would not be adverse to the public interest.

4. Likelihood of Prevailing on the Merits. Having established the first three prerequisites for temporary injunctive relief, the plaintiffs need only show that the issues presented are

so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation. *See Tri-State Generation*, 805 F.2d at 358; *Franklin Savings Ass'n*, 732 F.Supp. at 1124-25. The court concludes the Tribes have met this burden.

The Tribes have presented arguments which call for analysis of new legislation which substantially changes the course of business between the state of Kansas and the Tribes as it relates to the assessment and taxation of motor fuels sold on Indian lands. They have also placed before the court apparently properly negotiated and signed Tax Compacts between the state of Kansas and the Tribes which, heretofore, the state has honored. Whether the state of Kansas has jurisdiction to tax fuel sold on Indian lands is also questioned under the Kansas Act for Admission and the current law of the United States Supreme Court in *Oklahoma Tax Commission v. Chickasaw Nation*, — U.S.—, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

Consequently, on the basis of the information presently available, the court, having considered all of the arguments, concludes that the Tribes have presented issues "so substantial, serious, difficult and doubtful as to make them fair game for litigation." *Tri-State Generation*, 805 F.2d at 358.

Because the Tribes at this early stage of the proceedings have satisfied the four requirements for obtaining temporary injunctive relief, the court determines that a temporary restraining order is warranted to preserve the status which existed prior to September 6, 1995, until such time as the court considers, on the basis of evidence to be submitted by all parties, the Tribes' motion for a preliminary injunction.

TEMPORARY RESTRAINING ORDER

IT IS THEREFORE BY THE COURT ORDERED that the defendant Kansas Department of Revenue is enjoined and restrained from applying and enforcing the collection of any motor fuel tax on tribal retail motor fuel sales on Indian lands, including sales from distributors to the Tribes, as outlined in

Senate Bill No. 88 signed on May 7, 1995, and House Bill No. 2161 signed on May 17, 1995, and implemented on September 6, 1995.

IT IS FURTHER ORDERED that this temporary restraining order shall be effective until such time as the court has ruled on the plaintiff's motion for preliminary injunction, following a hearing at which all parties shall have the opportunity to present evidence and further argument to this court.

IT IS FURTHER ORDERED that in the exercise of its discretion, the court has considered the issue and determined that a bond, pursuant to Fed.R.Civ.P. 65(c), is unnecessary because "there is an absence of proof showing a likelihood of harm." *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461 (10th Cir.1987).

IT IS FURTHER ORDERED that this matter shall be set for hearing on the plaintiffs' motion for preliminary injunction on **Wednesday, November 8, 1995, at 9:30 a.m.** in courtroom 403, United States District Court for the District of Kansas, Topeka, Kansas.

ORDER ON MOTIONS

This matter is before the court on plaintiffs' Sac and Fox Nation of Missouri, Iowa Tribe of Kansas and Nebraska, and Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas, the ("Tribes"), Motion for Issuance of Contempt Citation and Other Remedial Relief (Doc. 19) and defendant's Motion for Modification or Clarification of Temporary Restraining Order (Doc. 21). The Tribes claim that defendant John D. LaFaver, Secretary, Kansas Department of Revenue (Department), is in violation of this court's Memorandum and Order filed October 5, 1995.

The court's order language stated in pertinent part:

> . . . that the defendant Kansas Department of Revenue is enjoined and restrained from applying and enforcing the collection of any motor fuel tax on tribal retail motor fuel sales on Indian lands, including sales from distributors to the Tribes, as outlined in Senate Bill No. 88 signed on May 7, 1995, and House Bill No. 2161 signed on May 17, 1995, and implemented on September 6, 1995.
>
> The court further ordered:
>
> . . . that this temporary restraining order shall be effective until such time as the court has ruled on the plaintiffs' motion for preliminary injunction, following a hearing at which all parties shall have the opportunity to present evidence and further argument to the court.

The court fails to see how this clear and unambiguous language can be misunderstood. However, in an attempt to further illumine the order of this court, let it be clear that the Department is enjoined and restrained from applying or enforcing collection of any motor fuel tax on tribal fuel sales on Indian lands, *including sales from distributors* as outlined in Senate Bill No. 88 signed May 7, 1995, and House Bill No. 2161 signed on May 17, 1995 and implemented on September 6, 1995. The court's order prohibits the collection of any tax under Bill No. 88 or Bill No. 2161. This order extends from the date of implementation, September 6, 1995, until such time as the court has ruled on the Tribes' motion for preliminary injunction.

Should the Department attempt, in any way, to apply, enforce, implement, or otherwise put into effect Senate Bill No. 88 or House Bill No. 2161, the court will have no choice but to find the defendant in contempt of this court's order.

IT IS THEREFORE BY THE COURT ORDERED that plaintiffs' Motion for Issuance of Contempt Citation and Other Remedial Relief (Doc. 19) is, at this time, denied subject to reconsideration.

IT IS FURTHER ORDERED that defendant's Motion for Modification or Clarification of Temporary Restraining Order (Doc. 21) has been considered and is denied as moot.

Dated this 27 day of October, 1995, at Topeka, Kansas.